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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOUTHERN MOTOR CARRIERS
RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS
ASSOCIATION, INC.

and

NATIONAL ASSOCIATION of
REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT "B"

119pr

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QUESTIONS PRESENTED FOR REVIEW

The Interstate Commerce Act authorizes, but does not compel, motor common carriers of property to engage in the collective formulation of interstate rate proposals pursuant to agreements filed with and approved by the Interstate Commerce Commission. 49 U.S.C. § 10706(b). Most of the states authorize, but do not compel, the collective formulation of intrastate rate proposals by motor common carriers of property. Against this background, the questions presented are as follows:

1. Whether, in disregard of controlling decisions of this Court involving the state action doctrine, the court below erroneously inferred a Congressional intent to condemn under the federal antitrust laws activities conducted in intrastate commerce which are expressly authorized and immunized from those laws when conducted in interstate commerce?

2. Whether, contrary to prior decisions of this Court and of the Courts of Appeals for the District of Columbia and Ninth Circuits, the Court below erroneously construed the "state action" doctrine to require as a prerequisite to its application that a state formally compel private parties to act in a manner violative of federal antitrust laws?

3. Whether, contrary to prior decisions of this Court, the court below erroneously held that the *Noerr-Pennington* doctrine is inapplicable to the collective formulation of rates to be proposed to the state regulatory commissions?

PARTIES

The caption of this Petition contains the names of all parties to this action in the Fifth Circuit. One Defendant, Motor Carriers Traffic Association, Inc., did not appeal from the ruling of the District Court. Neither Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., nor the National Association of Regulatory Utility Commissioners has any parent, subsidiary or affiliated companies.

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT "B"

Southern Motor Carriers Rate Conference, Inc. ("SMCRC"), North Carolina Motor Carriers Association, Inc. ("NCMCA") and the National Association of Regulatory Utility Commissioners ("NARUC"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, Unit "B," in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, attached as Appendix A, is reported at 467 F. Supp. 471 (N.D. Ga. 1979). The opinion of the Fifth Circuit, Unit "B," attached as Exhibit B, is reported at 672 F.2d 469 (5th Cir. Unit "B" 1982). An order granting rehearing *en banc* is attached as Appendix C. The opinion of the Fifth Circuit, Unit "B," on rehearing, attached as Appendix D, is reported at 702 F.2d 532 (5th Cir. Unit "B" 1983).

JURISDICTION

The judgment of the Fifth Circuit, Unit "B," was entered on April 5, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was granted by order on June 7, 1982. The *en banc* judgment of the Fifth Circuit, Unit "B," was entered on April 11, 1983. On April 21, 1983, Petitioners moved the Fifth Circuit, Unit "B," for a stay pending the filing of this petition for writ of certiorari. By order dated May 6, 1983, attached as Appendix E, that court granted the motion and stayed its mandate up to and including May 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. 1981), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

Respondent United States of America brought this antitrust action in the United States District Court for

the Northern District of Georgia seeking injunctive relief for alleged violations of Section 1 of the Sherman Act.[1] Petitioners SMCRC and NCMCA are associations of motor common carriers of property through which their members collectively propose rates to the appropriate state regulatory authorities. Petitioner SMCRC conducts its intrastate activity in the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee.[2] Petitioner NCMCA conducts its activity in the State of North Carolina. Petitioner NARUC is an association of state regulatory commissioners, whose duties include the oversight and regulation of intrastate motor common carriers.

Respondent alleged that Petitioners SMCRC and NCMCA, by virtue of their conduct in collectively formulating rate proposals to be filed with the various state regulatory commissions, were engaged in a conspiracy to fix prices.[3] It is undisputed that collective rate schedules prepared by Petitioners SMCRC or NCMCA have to be submitted to the regulatory commissions in those states in which the rates are to be effective. Nor is it disputed that the state commissions exercise careful review over rate filings. The district court found that:

> Procedures within each commission for review of published rates tend to be uniform. A published rate

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[1] 15 U.S.C. § 1 (Supp. 1983).

[2] SMCRC also functions as the agency through which its members collectively propose rates to the Interstate Commerce Commission for interstate transportation within the South and between the South and much of the rest of the country. In so doing, it employs precisely the same procedures as it employs in the case of intrastate rates. The various state regulations and the role of the rate conferences were described in more detail by the district court. Appendix A at 3a-7a.

[3] Appendix A at 2a.

> goes into effect unless set down for a hearing by the commission. The commissions consistently require hearings, however, and an order scheduling a hearing automatically suspends a proposed tariff.[4]

In the district court, Petitioners argued, *inter alia*, that their conduct was immune from the federal antitrust laws by virtue of the state action doctrine and the *Noerr-Pennington* doctrine. Petitioners argued that the conduct did not violate the Sherman Act, since it was the state regulatory commissions which actually set the rates in response to a petition submitted by Petitioners.

On cross-motions for summary judgment, the district court held that the state action doctrine did not apply because the involvement of the state regulatory commissions did not amount to state compulsion[5] and that *Noerr-Pennington* did not apply because the court believed it could "accord independent significance to the defendants' activities of rate formulation and proposal."[6] The court recognized the obvious principle that:

> If the defendants may, in exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.[7]

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[4] Appendix A at 9a.

[5] Appendix A at 21a-22a. The Court held that compulsion was established as a prerequisite to state action in *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975). Appendix A at 18a.

[6] Appendix A at 26a.

[7] Appendix A at 25a.

Nonetheless, the court concluded that, "Even though the proposals require state sanction to take effect, the industry's participation in the process surpasses mere petitioning and renders the industry, in part, a decision-maker."[8] Finally, the district court found that the conduct constituted price fixing in violation of the Sherman Act notwithstanding the requirement that the proposed rates be submitted to the state regulatory commissions.[9]

On appeal, a divided Panel of the Fifth Circuit, Unit "B," affirmed. Judge Johnson, joined by Judge Scott of the Middle District of Florida, sitting by designation, agreed with the district court that compulsion is a prerequisite to application of the state action doctrine. The majority interpreted this Court's recent decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*,[10] as not altering a *Goldfarb* compulsion requirement.[11] Judge Hill dissented, finding that *Midcal* established a two-pronged test for state action which served the same interests as a compulsion requirement:

> By requiring that a state actively supervise the implementation of its economic policy, the *Midcal* test ensures that the *state* has determined that the challenged activity is in furtherance of the *state's* policy.[12]

As to *Noerr-Pennington*, the Panel majority agreed with the district court that the initial step of collectively formulating a rate proposal could be viewed separately from the act of presenting the proposal to the state regulatory commissions. So viewed, the majority held that

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[8] *Id.*

[9] Appendix A at 28a.

[10] 445 U.S. 97 (1980).

[11] Appendix B at 36a-39a.

[12] Appendix B at 55a (Hill, J., dissenting) (emphasis in original).

Noerr-Pennington did not protect the collective formulation of rates despite Respondent's implicit concession that the presenting of the proposed rates is protected activity.[13] Finally, the majority concluded that the activity at issue constituted price fixing in violation of the Sherman Act.[14]

On rehearing *en banc*, a divided court of appeals affirmed, 8-4. Judge Johnson, again writing for the majority, reiterated the view he expressed in the Panel opinion that *Midcal* did not alter a *Goldfarb* compulsion requirement.[15] Judge Hill, again in dissent, expressly recognized the conflict between the holding of the majority and the "clear and explicit" holding of this Court in *Midcal*.[16]

Petitioners submit that Judge Hill's interpretation of *Midcal* is correct in finding that "[u]nlike the arbitrary compulsion requirement," the two-pronged test "affords states greater flexibility in the formulation of constructive regulatory programs so long as the state clearly and affirmatively expresses its intent to do so and remains continuously and actively involved."[17]

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[13] Appendix B at 43a-44a.

[14] Appendix B at 46a-47a.

[15] Appendix D at 73a-74a.

[16] Appendix D at 81a (Hill, J., dissenting).

[17] Appendix D at 84a (Hill, J., dissenting).

REASONS FOR GRANTING THE WRIT

(a) This Case Is Of Exceptional National Importance Because Of Its Critical Impact On The Regulation Of Motor Common Carriers By The States

This case is of crucial importance to the regulation of the intrastate rates of motor common carriers by the several states. It immediately affects adversely the implementation of the regulatory schemes of five states (Alabama, Georgia, Mississippi, North Carolina and Tennessee) located in four federal judicial circuits (Fourth, Fifth, Sixth and Eleventh). As the District Court said in granting Petitioner NARUC leave to intervene as a party defendant:

> "Whether these five commissions will be able to continue in their present ratemaking routines is an essential question posed in this litigation. A negative answer to this question will necessarily impede or impair the commissions' interest in continued use of the present rate conferences. *The answer will not be one of general policy preference but of immediate legality of the conference system.* NARUC's proposed representation of the interests of these five commissions thus satisfies the real interest and potential harm prerequisites of intervention, Rule 24(a)(2)." (Emphasis added)

At the invitation of the District Court, all of the five states participated in the case as *amici curiae*. Without exception, they all stated in no uncertain terms, in both briefs and affidavits by their regulatory officers, that the collective formulation of intrastate rate proposals is an integral part of their chosen system of rate regulation, and that without it their ability to discharge their regulatory duties would be severely disrupted, if not made impossible. (R. 1655, 1674, 1676, 1680-81; R. 524, 622).

Moreover, the decision below, if left undisturbed, will have a devastating impact on the regulatory schemes of the states represented by Petitioner NARUC. The schemes described herein, including the provisions for the collective formulation of rate proposals, have been in effect in most states for at least three decades.[18] The decision below will require the dismantling of those schemes, and thus force state regulatory commissions to act upon rate applications on an individual basis for each of the hundreds of trucking companies doing business within their jurisdictions. The consequent burden in terms of time, effort and expense, will, as a practical matter, gut the ability of the states to discharge their duty to see to it that motor carrier rates applicable for intrastate transportation are just, reasonable and nondiscriminatory.

(b) The Decision Of The Fifth Circuit, Unit "B," Conflicts With The Principles Announced By This Court In Cases Involving The State Action Immunity From Federal Antitrust Laws

Since 1943 this Court has recognized that Congress did not intend the antitrust laws to deprive the states of their

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[18] Petitioner NARUC's *1981 Annual Report on Utility and Carrier Regulation* at 731 lists forty states with regulatory schemes of which the collective formulation of rates is an integral part. They are: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wisconsin. As of 1982, Wisconsin completely deregulated the rates of motor common carriers of property, and the Public Service Commission of West Virginia declared a two year moratorium on collective rate formulation.

sovereign power to regulate intrastate commerce as they see fit. The decision in *Parker* v. *Brown*[19] establishing antitrust immunity for state regulatory programs "is grounded in our federal structure. 'In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.' "[20] In short, the basic *Parker* proposition is that, while Congress has the power to preempt state economic regulation, an intent to do so will not be inferred absent clear evidence. Applying that proposition here, it is clear that the decision below necessarily infers that the Sherman Act condemns intrastate activities which are the same as the interstate activities Congress expressly authorized and immunized under the Interstate Commerce Act.

The Interstate Commerce Act authorizes, but does not compel, motor common carriers operating in interstate commerce to engage in the collective formulation of rates pursuant to agreements filed with and approved by the Interstate Commerce Commission. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. § 10706(b). The Act reserves to the states the power "to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. § 10521(b)(1).

In the five states involved in this proceeding and most other states, the collective formulation of rate proposals

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[19] 317 U.S. 341 (1943).

[20] California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (quoting *Parker* v. *Brown*, 317 U.S. at 351).

is authorized, but not compelled, by statute or administrative rule or policy. A number of states have adopted statutes which authorize the collective formulation of rate proposals and immunize that activity from their antitrust laws in language that is virtually identical to former Section 5a of the Interstate Commerce Act, former 49 U.S.C. 5b. North Carolina has such a statute and Tennessee has such a rule. Georgia, which has no state antitrust law, also authorizes by statute collective rate formulation. The various state provisions relating to collective formulation of rate proposals are designed to parallel and complement the federal provisions relating to collective rate formulation. Hence, it is plainly untenable to infer, as the Court below did, that Congress intended to preempt state law designed to effectuate in intrastate commerce the same policies that the federal law is designed to effectuate in interstate commerce. As Judge Clark said in his dissent, the majority opinion "completely ignores the Interstate Commerce Act, public policy, history and fairness." As he pointed out, the holding of the majority leads to the following anomalous result:

> Southern Motor Carriers Rate Conference, Inc., may file with the Interstate Commerce Commission rates for the carriage of carpeting from Rome, Georgia to Nashville, Tennessee. That same Conference may perform the identical function for the intrastate carriage of carpeting from Rome to Macon, Georgia, approximately the same distance. This has been done for three decades prior to the filing of this action in 1976. It is patently unfair at this late date to declare that these defendants violated the antitrust act when following identical procedures that are not violative of the antitrust act when done in interstate commerce.[21]

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[21] Appendix D at 93a (Clark, J., dissenting).

In *Parker*, the State Agricultural Prorate Advisory Act authorized private raisin growers to jointly propose and petition the State Agricultural Prorate Advisory Commission to approve a marketing program for the raisin crop. The Court held that an approved program was immune from the antitrust laws:

> It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.[22]

Thus, the principle of state action immunity from antitrust laws was established in a case in which, as here, the formulation and proposal of the program to state authorities was the voluntary collective action of private persons. Indeed, *Parker* stands for the proposition that where the state authorizes private parties to act jointly as an integral part of a state regulatory program, and where the state not only engages in careful oversight of such acts but retains final responsibility to approve or disapprove the conduct, the approved action constitutes state action which is immune from antitrust scrutiny.

This analysis of *Parker* is strongly supported by this Court's recent decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*[23] In *Midcal*, a California statute required all wine producers, wholesalers and rectifiers to file fair trade contracts or price schedules with the state. Sales of wine at prices other

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[22] *Parker* v. *Brown*, 317 U.S. at 352.

[23] 445 U.S. 97 (1980).

than those established in the fair trade contracts or price schedules were prohibited. The state retained no responsibility or authority to review the contracts or schedules filed in compliance with the statute. In reviewing the statute, the *Midcal* Court set out two guiding principles for application of the *Parker* state action doctrine:

> First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.[24]

Although finding the first prong satisfied, this Court held that the statute in *Midcal* failed to meet the second prong of this standard because:

> The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of the fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program.[25]

Despite this Court's clear articulation of the standard to be applied in state action cases, the Fifth Circuit held that a "clearly articulated and affirmatively expressed" state policy is not sufficient to constitute the basis of a state action defense by a private defendant unless the state compels, rather than authorizes, the private party to act. The court held that:

> In the context of private parties, the first *Midcal* standard makes sense only if it includes a compulsion requirement. This is because we do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to

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[24] 445 U.S. at 105.

[25] Id. at 105-06.

the private party to carry out that policy or not as he sees fit.[26]

The majority ignores several practical points in reaching this conclusion. First, in contrast to *Midcal*, the private parties merely propose a rate schedule. They have *no* authority to make rates effective until the state regulatory commissions determine that they are lawful under the standards of their regulatory statutes. Thus, the private parties' initiative here, like the private parties' initiative in *Parker*, can be carried out only if the state reviews it and approves it. Second, the majority fails to recognize that by meeting the extensive oversight prong of *Midcal*, the state retains control of its policies. Indeed, there was no dispute in this case regarding the fact that "each state actively supervises the collective ratemaking process . . . ."[27]

The Fifth Circuit expressly declined, in the absence of compulsion,[28] to apply *Midcal* and consider whether the state policies embodied in the statutes authorizing collective rate proposals "were sufficiently clearly articulated

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[26] United States v. Southern Motor Carriers Rate Conference, Inc., Appendix D at 74a.

[27] Appendix D at 73a.

[28] It is interesting to note that the majority defines "compulsion" as not necessarily excluding action taken at the behest of a private party which petitions the state. "Still, once a state has adopted some policy, whether or not after a petition by a private party, private parties will be exempt from the antitrust laws only if the state requires some action pursuant to that policy." Appendix D at 68a n.6. In this sense, compulsion is present here since the members of Petitioners SMCRC and NCMCA who are party to a collectively formulated rate proposal are compelled to charge the rates approved by the state regulatory bodies, regardless of whether the rates are the same as those proposed.

and affirmatively expressed for the state action exception to apply."[29] So sharply does this holding conflict with *Midcal* that Judge Hill, in dissent, was prompted to observe:

> The majority view that the Supreme Court could not possibly have meant what it said in . . . *Midcal* . . . seems presumptuous at worst, and unsound policy as it pertains to the facts of this case at best. The *Midcal* test is clear and explicit. It should not be ignored simply because a different conclusion can be reached by reexamining the same line of cases already analyzed by the Supreme Court.[30]

In addition to its reliance on the notion that *Midcal* incorporates the compulsion requirement discussed in earlier state action cases[31], the majority sought to distinguish *Midcal* by suggesting that the "case had nothing to do with the applicability of a state action defense to a private party."[32] The court apparently had reference to the fact that the state regulatory commission, rather than the private party being regulated, was named as the defendant. This distinction elevates form over substance in that it leaves in the hands of plaintiffs the power to determine the applicability of federal antitrust laws. Indeed, the Fifth Circuit's decision leads to the conclusion that *Parker* would have been decided differently had the defendants been raisin growers, since there was no compulsion for the growers to file a petition for a joint market-

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[29] Appendix D at 65a.

[30] *Id.* at 81a (Hill, J., dissenting).

[31] The majority first reviewed *Parker*, 317 U.S. 341, and then went on to find the origin of the compulsion requirement in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The court also looked for support to Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

[32] Appendix D at 74a.

ing plan.[33] Petitioners submit that the conflict between the holding of the Fifth Circuit, Unit "B," and this Court's holdings in *Parker* and *Midcal* could not be more direct.

(c) The Decision Of The Fifth Circuit, Unit "B," Conflicts Directly With Decisions Of The Ninth And District Of Columbia Circuits And Conflicts In Principle With A Decision Of The Seventh Circuit.

As detailed in subsection (a), *supra*, the Fifth Circuit has held[34] that compulsion is an absolute prerequisite to application of the two-pronged state action test stated in *Midcal* when the defendants are private parties. In direct conflict with this holding is the decision of the Ninth Circuit in *Turf Paradise, Inc.* v. *Arizona Downs*.[35] In *Turf Paradise*, which involved an antitrust claim filed by a private race track owner and operator against another private race track operator, the Ninth Circuit found that compulsion, rather than being a prerequisite to application of the *Midcal* test, was subsumed within the two

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[33] The express concern for federalism stated in *Parker*, 317 U.S. at 351, surely could not have had so narrow a basis. "[I]f the federal government or a private litigant could have enforced the antitrust laws against the raisin producers, effectuation of state policy would have been thwarted just as if the state action immunity were never granted." Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711, 724 (D.D.C. 1979) *aff'd per curiam*, No. 79-1658 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). *See also* Appendix D at 83a (Hill, J., dissenting) (stating that a distinction based on the identity of the defendant "would have proven unreasonable and inconsistent with the federalism concerns" expressed in Parker).

[34] See *supra* note 7 and accompanying text.

[35] 670 F.2d 813 (9th Cir. 1982), *cert. denied*, 102 S.Ct. 2308 (1982).

elements of the test. In sharp contrast to the Fifth Circuit, the Ninth Circuit found that:

> *Goldfarb* does not preclude a finding of state action immunity merely because of the presence of some private decision making pursuant to a clearly articulated state policy that is actively supervised by a state entity even though the supervision does not rise to the level of compulsion.[36]

The Fifth Circuit's conflict with the District of Columbia Circuit is just as direct as its conflict with the Ninth Circuit. In *Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*,[37] the District of Columbia Circuit affirmed *per curiam* the district court's decision granting summary judgment to state and private defendants accused of engaging in a conspiracy in restraint of maritime transportation. After holding that the state defendants were immune from antitrust liability, the district court stated:

> Although there has been some judicial uncertainty regarding the reach of the *Parker* doctrine, it seems clear that a majority of the present Supreme Court believes that *Parker* is equally applicable to suits against private parties whose actions are compelled *or regulated* by the state.[38]

Moreover, the court held that the state action defense was not lost by virtue of the fact that the private defendants had voluntarily lobbied and advised the Puerto Rico legislature regarding the establishment of the government's maritime transportation system. After distin-

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[36] 670 F.2d at 823 n.8.

[37] 475 F. Supp. 711 (D.D.C. 1979), *aff'd per curiam*, No. 79-1658 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

[38] 475 F. Supp. at 723 (emphasis added).

guishing *Goldfarb* and *Cantor* as involving "neither adequate supervision nor state intent to displace antitrust enforcement,"[39] the court noted that *Parker* itself involved voluntary initiation by private parties of the relevant state processes.[40]

Finally, a compulsion requirement was rejected by the Seventh Circuit in *Town of Hallie* v. *City of Eau Claire*.[41] Although the precise holding of *Hallie* involved solely a municipal defendant, the court engaged in a careful analysis of *Midcal's* active supervision requirement and correctly concluded that it "ensures that the private parties not abuse the anticompetitive power given to them and act pursuant to the state policy at stake."[42] This distinction made by the Seventh Circuit is crucial to understanding the error made by the Fifth Circuit, in the conflicting decision below. The Fifth Circuit was concerned with private party abuse of state power.[43] Unlike the Seventh Circuit, however, the Fifth Circuit failed to recognize that the purposes served by a compulsion requirement are effectively embodied in the active state supervision requirement of *Midcal*. For this reason, the court erroneously believed compulsion was a "threshold test" for state action immunity.[44]

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[39] *Id.* at 724-25.

[40] See *supra* note 3 and accompanying text.

[41] 700 F.2d 376, 381 (7th Cir. 1983).

[42] *Id.* at 384.

[43] See *supra* note 7 and accompanying text.

[44] Appendix D at 67a.

(d) The Decision Of The Fifth Circuit, Unit "B," Is Contrary To The Principles Announced By This Court As Embodied In The *Noerr-Pennington* Doctrine

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*,[45] this Court unanimously held that collective action by railroads seeking state legislation favorable to the railroads and adverse to motor carriers was exempt from antitrust attack, holding that: "No violation of the [Sherman] act can be predicated upon mere attempts to influence the passage or enforcement of laws."[46] The *Noerr* Court further reasoned:

> We think it equally clear that the Sherman Act does not prohibit two or more persons from *associating together* in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.[47]

This reasoning was reiterated by the Court four years later in *United Mine Workers* v. *Pennington*.[48] In *Pennington*, large coal operators and unions had agreed to seek regulatory action from the Secretary of Labor which would have been beneficial to them but harmful to small, non-union coal operators. The Court held that *Noerr* extended to efforts to influence the executive branch:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.[49]

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[45] 365 U.S. 127 (1961).

[46] *Id.* at 135.

[47] *Id.* (emphasis added).

[48] 381 U.S. 657 (1965).

[49] *Id.* at 670.

Subsequently, the Court held in *California Motor Transport Co.* v. *Trucking Unlimited*[50] that the protection of *Noerr-Pennington* extended to efforts to "use the channels and procedures of state and federal agencies and courts".[51]

Thus, this Court's pronouncements on the *Noerr-Pennington* doctrine make it clear that it is protected activity to attempt to influence any branch or agency of government and to associate together for that purpose. In direct conflict with these principles is the holding of the Fifth Circuit panel that *Noerr-Pennington* is inapplicable to the collective formulation of a rate proposal to a state regulatory agency.[52] The Fifth Circuit, in so doing, adopted in part the rationale of the district court on this point:

> The government answers that the complaint charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect, ostensibly pursuant to state sanction. Implicitly conceding that the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.
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> This case is not technically one to which *Noerr-Pennington* has traditionally been applied. *Noerr* and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. The parties have cited no cases in which courts

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[50] 404 U.S. 508 (1972).

[51] *Id.* at 510-11.

[52] *U.S.* v. *Southern Motor Carriers Rate Conference*, 672 F.2d 469, 476-77 (5th Cir. Unit "B") *rehearing en banc*, Appendix D (5th Cir. Unit "B").

> have invoked *Noerr-Pennington* to immunize price fixing among competitors.[53]

The Fifth Circuit panel acknowledges Respondent's recognition of the applicability of *Noerr-Pennington* to the act of presenting rate proposals to the state regulatory commissions. Nonetheless, the court seeks to separate preparatory conduct which is necessary and incidental to presentation of the proposals. However, to hold, as the Fifth Circuit does here, that collective rate proposals may be submitted to state regulatory agencies, but may not be formulated, reduces *Noerr-Pennington* to a meaningless shell. If Petitioners have a right to collectively ask the state commissions to approve rates, they must have the ancillary right to collectively decide what rates they want the commissions to approve. Moreover, to say, as the Fifth Circuit does here, that Petitioners may seek legislative or regulatory approval of collective ratemaking procedures, but may not formulate and seek approval of rates under those procedures, makes Petitioners' First Amendment right to collectively petition the government depend on what they ask the government to do. Obviously, such a proposition is untenable.

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[53] 672 F.2d at 477 (quoting *U.S.* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 484-85 (N.D. Ga. 1979).

CONCLUSION

For all of the reasons set forth herein, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, Unit "B".

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT,
N.D. GEORGIA,
ATLANTA DIVISION
MARCH 20, 1979.

Civ. A. No. 76-1909A.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., Motor Carriers Traffic Association, Inc., North Carolina Motor Carriers Assoc., Inc., National Association of Regulatory Utility Commissioners, *Defendants*.

ORDER

RICHARD C. FREEMAN, District Judge.

On November 17, 1976 the United States filed a complaint under Section 4 of the Sherman Act, 15 U.S.C. § 4,[1] to enjoin the continuing violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[2] The three rate bureau defendants, Southern

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[1] Section 4 of the Sherman Act, 15 U.S.C. § 4, provides in pertinent part:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . .

[2] Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Motor Carriers Rate Conference, Inc. ("SMCRC"), Motor Carriers Traffic Association, Inc. ("MTCA"), and North Carolina Motor Carriers Association, Inc. ("NCMCA"), represent common carriers before the regulatory commissions of the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee. On behalf of their members, the defendants publish tariffs containing proposed rates for intrastate for-hire transportation of general commodities. The complaint alleges that the defendants and their co-conspirators have engaged in a continuing conspiracy to fix these rates within the five subject states. The parties completed discovery following the court's ruling, on July 4, 1977, on the defendants' motions to dismiss the complaint and the plaintiff's motion to strike certain affirmative defenses. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 439 F.Supp. 29 (N.D.Ga. 1977). As a part of that order, we invited the Attorneys General of the States of Alabama, Georgia, Mississippi, Tennessee and North Carolina "to participate in the instant action by filing briefs, memoranda, or evidence which may be a critical aid in the ultimate resolution of the issues presented. . . ." *Id.* at 52. The action is presently before the court on the parties' cross-motions for summary judgment, Rule 56, Fed.R.Civ.P. For the reasons set forth below, we GRANT the government's motion for summary judgment and DENY the summary judgment motions filed by the defendants.

Discovery in this action has led to the development of a substantial record. While the parties vigorously dispute the significance of the facts in the record, they do not dispute the facts themselves, and have filed extensive stipulations of fact. The statement of the case which follows will review first, the regulatory schemes in the five subject states; second, the operations of the defendants in formulating and publishing intrastate rates before the state commissions; and finally, the procedures followed by the commissions in reviewing the proposed rates. The regulatory schemes of the various states differ somewhat, and we will survey each separately. As the rate formulation practices are similar among the defendant

conferences, and as the review mechanisms are similar among the commissions, we will describe these by reference to the North Carolina example. To the extent that there is a dispute among the parties, we will of course view the facts in a light most favorable to the defendants. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

THE STATE REGULATORY SCHEMES

Alabama—Under Alabama law, all nonexempted motor carriers are subject "to control, supervision and regulation by the [Alabama Public Service] Commission." Title 48, Ala.Code § 301(3). That authority includes regulation of intrastate commerce "except insofar as the same may be in conflict with the provisions of the constitution of the United States and the acts of congress" in force in 1940 or thereafter enacted. Title 48, Ala.Code § 301(4). The powers and duties of the Alabama Public Service Commissions are set forth in Title 48, Ala.Code § 301(5), and include:

> 1. [The duty] [t]o regulate common carriers by motor vehicle as provided in this article and to that end the commission may establish reasonable rules and requirements with respect to adequate service, transportation of passengers, baggage, freight and express, . . .
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> . . . . .
>
> 4. To supervise and regulate common carrier in all matters affecting the relationship between such common carriers and the traveling and shipping public.
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> . . .

Alabama Code § 301(17) further places concomitant duties on the common carriers with respect to rates, fares, and charges, including, *inter alia:*

> B. . . . the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment and facilities for the intrastate transportation of property in the State of Alabama; to establish, observe

> and enforce just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto . . . [for] all . . . matters relating to or connected with the intrastate transportation of property in the State of Alabama.
>
> C. Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad or express or water; . . . In case of such joint rates, fares or charges, it shall be the duty of the carrier parties thereto to establish just and reasonable regulations and practices. . . .[3]

These provisions illustrate a common pattern among the subject states: motor carriers are required to cooperate for the limited purpose of establishing joint rates, i.e., rates covering a shipment in which one carrier operates over only part of the route and another carrier serves the remainder. In this fashion, a shipper is able to obtain a single price for a shipment involving more than one carrier. On the other hand, Alabama does not require that two carriers providing identical service along the *same* route charge identical prices, or confer as to the prices each will charge.

Georgia—Motor common carriers came under the jurisdiction of the Georgia Public Service Commission in 1929. Pursuant to the requirements of the Georgia statutes all common carriers must obtain certificates of public convenience and necessity. The Public Service Commission has the sole authority to prescribe just and reasonable rates, fares and charges. The Commission maintains a staff of seven professionals and additional clerical personnel to analyze motor common carrier

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[3] Interstate Commerce Tariff Circular No. 3 provides, "The term joint rate means a rate that applies over the lines or routes of two or more carriers. . . ." Horace F. Hartley, Director of Transportation Rates and Services, Georgia Public Service Commission, described a joint rate as a rate derived by two or more carriers to cover a single interlining movement of freight in which those carriers participate. Deposition of Horace F. Hartley at 61-62.

costs of Class "A" carriers.[4] As in Alabama, Georgia Law sanctions cooperation between motor carriers in establishing through routes at prescribed joint rates. The statutory framework requires that the Georgia Public Service Commission

> prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage and property, and for all services rendered by motor common carriers in connection therewith, and the tariffs therefor shall be in such form, and shall be filed and published in such manner and on such notice as the commission may prescribe, and shall be subject to change on such notice and in such manner as the commission may prescribe.

Ga.Code Ann. § 68-613. Rule 10(a), General Motor Carrier Rules and Regulations of the Georgia Public Service Commission provides that

> Motor carriers of property operating under certificates Class 'A' will be required to receive property destined to stations located on routes of other Class 'A' carriers, and to interchange such property at rates prescribed by this Commission, with such connecting carriers.

Mississippi—The regulation of motor common carriers operating in intrastate commerce within Mississippi was vested in the Mississippi Public Service Commission by the Motor Carrier Regulatory Act of 1938. The public policy expressed by the 1938 Act substantially paraphrases the National Transportation Policy, *see* 49 U.S.C. preceding §§ 1, 301, 901 and 1001, and provides that the purpose of the regulation of motor common carriers is to ensure "reasonable charges . . . without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices. . . ."

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[4] Rule 2 of the Rules and Regulations defines Class A carriers as:

> common carriers of passengers and/or property operating over a fixed route or between fixed termini in intrastate and interstate commerce, under Certificates of Public Convenience and Necessity.

Mississippi law comes the closest to requiring uniform rates to be charged by competing carriers serving the same route. Rule 39d(4) of the Mississippi Public Service Commission provides:

> Where two or more freight rates are published to apply on certain articles or commodities between points in Mississippi, by the same motor carriers, or by different motor carriers, the lowest rate, whether class or commodity, shall be applied over all motor carriers accepting and transporting freight between such points; and in no instance should a rate be published or applied which exceeds the aggregate of published intermediate rate, class or commodity, or class and commodity, unless and until proof of the reasonableness of such rate is submitted to and approved by the Commission, provided that in the initial filing penalties will not apply for violation of this rule until such is called to the attention of the carriers and reasonable opportunity is given for adjustment or justification.

Even here, however, a carrier retains the right to file an independent rate, which may be lower than class rates in a tariff. *See* Deposition of David Screws at 73-75. A Transportation Rate Specialist for the Mississippi Commission has described the uniformity generally occurring in Mississippi intrastate rates as "unwritten law." *Id.* at 71.

North Carolina—Since 1947 the North Carolina Utilities Commission has been charged with the exclusive authority to make rates for all motor common carriers subject to its jurisidiction.

House bill 417 of the North Carolina Legislature, entitled "An Act to provide for Uniform and Joint Rates Among Motor Carriers of the Same Class" contains provisions similar to those in the federal Motor Carrier Act. The bill, which was enacted by the state legislature, N.C.Gen.Stat. § 62-152.1, allows two or more carriers to enter into an agreement relating to "rates, fares, classifications, divisions, allowances or charges . . . [f]or the purpose of achieving a stable rate structure." The law further provides that it "shall be the policy of [the State of North Carolina] to fix uniform rates for the same

or similar services by carriers of the same class." As in Section 5a of the Motor Carrier Act, the parties to the agreement may apply to the state public service commission for approval of the agreement. The parties to any agreement so approved are relieved from the operation of the state antitrust laws in the making and carrying out of the agreement.

Tennessee—Under Tennessee law, the Tennessee Public Service Commission fixes the rates which motor carriers may charge. Although any carrier is permitted to reduce its rates without prior authorization of the Commission, no general increase is permitted until hearings have been held and the approval of the Commission secured. Rule .40 of Chapter 1220-2-1 of the Tennessee Public Service Commission, Division of Motor Carriers, adopts Section 5a of the Interstate Commerce Act, 49 U.C.S. § 5b, providing:

> The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, division, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation, or establishment thereof as set forth by the Interstate Commerce Commission in Section 5a of the Interstate Commerce Act, are hereby adopted by the Tennessee Public Service Commission; providing, however, that the final determination on any rates, fares, classification, divisions, allowances, charges, rules and regulations or procedures shall be left in its final determination to the Tennessee Public Service Commission.

THE ROLE OF THE RATE CONFERENCES

Each of the three defendant conferences operates in the state of North Carolina. NCMCA's procedures are typical of all three. Its rate proposals to the North Carolina Utilities Commission are formulated in NCMCA's rate committee and then submitted to the Commission for approval, disapproval, or modification. Each member of NCMCA is entitled to have a representative on the rate committee; when the rate commit-

tee meets to consider rate proposals, shippers are invited to be and are present during the discussion of rate proposals. Approximately 300 shippers subscribe to the NCMCA tariff, and therefore receive notice of all meetings of the NCMCA rate committee. Many shippers send their professional rate specialists to the rate committee meetings. After a discussion of a rate proposal by carriers and shippers, the shippers and their rate specialists leave and the members of the rate committee vote on the proposal by secret ballot. Members of NCMCA are not bound by the action of the rate committee, but instead have the right to announce and file an independent rate proposal with the Commission.

Where general rate increase proposals are involved, the rate committee of NCMCA may meet with members of the two other North Carolina rate bureaus, SMCRC and MCTA. On some occasions NCMCA gives its members notice of the meeting dates of the general commodity rate committees of SMCRC and MCTA. Shippers are also invited to and do attend the meetings, and many shippers send their rate specialists. The defendants claim the joint meetings are encouraged by the shippers because they can attend just one rate committee meeting on a proposed general rate increase rather than three. After a discussion of the proposed increase by shippers and carriers, the shippers and their rate specialists leave and the members of the NCMCA rate committee vote by secret ballot on a rate proposal separately from the rate committees of SMCRC and MCTA.

Where general rate increase proposals are involved, the rate bureaus may submit the same proposals to the Commission with the same effective date, but each conference makes a separate decision on the proposal, and submits its proposal to the Commission separately. When a general rate increase is proposed to the Commission for its action, NCMCA may avail itself of SMCRC personnel to prepare traffic studies to be presented at the hearing, and these studies are sometimes presented by the three bureaus at a Commission hearing.

REGULATORY PROCEDURE

Procedures within each commission for review of published rates tend to be uniform. A published rate goes into effect unless set down for a hearing by the commission. The commissions consistently require hearings, however, and an order scheduling a hearing automatically suspends a proposed tariff.

In North Carolina, no general rate increase has been granted without a hearing before the Commission, with the exception of an emergency fuel surcharge allowed on an interim basis during the Arab oil embargo in 1974. Prior to the hearing, the North Carolina Commission's Public Staff undertakes a separate, independent study into the necessity of the proposed increase. The Public Staff will require the carriers to furnish freight bills and information concerning other expenses so that it can arrive at an operating ratio to submit as evidence at the hearing. In addition, the Public Staff undertakes on-site review and verification of motor carrier books and records in order to gather evidence to be submitted at the hearing. After its investigation, the Public Staff through sworn testimony at the hearing will make a recommendation as to a proposed rate increase.

Where a general rate increase proposal is involved, the matter is heard by the Commission en banc or by a panel of three Commissioners. The hearing is open to the public, and evidence may be submitted by any interested party, including the applicant, any intervenor, the Public Staff and the utility division of the Attorney General's office in North Carolina. At a hearing on a general rate increase, NCMCA and MCTA may rely on a rate justification statement prepared for them by SMCRC. The statement may contain information about rates in other cases.

The record, in sum, reveals a relationship between the defendants and the regulatory processes in which they participate that ranges from friendly to intimate. The states, as amici, have stressed the integral role of the conferences, and it is clear that, at the least, they are a part of daily regulatory life.

Amidst the many ties between the states and the conferences, however, two important factors are not present in any of the subject states. First, no state requires that all rates among competing carriers for identical service by uniform.[5] Second, no state requires, either by statute or regulation, or other

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[5] Had the defendants argued, or had they established, that state law required all prices for identical services along the same route be uniform, this would be a very different case. We do not doubt that the five subject states are capable of entirely displacing the marketplace mechanism of setting prices with a system in which price competition plays no part. The states might have determined that their businesses and consumers would be best protected by a regulatory rate-making process that mandates uniform prices for a given service, typically based on a "just and reasonable" standard, than by the marketplace. Consequently, they could have replaced price competition with a state-mandated price-setting scheme in which intrastate common carriers would compete, but only by means other than price competition.

The nature of the carrier's participation in such a system regulated by legislative or administrative mandate would seem to be entirely different from the nature of its role in the marketplace. Where price competition is permitted (and protected), the individual participant attempts to lower prices so as to attract business from his competitors. Once prices are regulated, however, his participation in the price-setting "system" changes significantly, for his interest will usually lie in raising prices instead of lowering them. By charging a lower price he will ordinarily not gain an advantage over his competitors, who must always charge an identical price. Moreover, he will act in essentially the same manner regardless of whether he is alone or combining with other carriers, by attempting to convince the regulatory body to accept higher tariffs.

Were prices made uniform by state mandate, we would question the applicability of an antitrust theory designed to stimulate price competition. Indeed it would be doubtful that such practices as are engaged in by the defendant conferences could correctly be said to be "in restraint of trade," within the meaning of Section 1 of the Sherman Act. The parties have made it clear, however, that each of the subject states guarantees to individual carriers the right to charge

express legislative or administrative mandate, that rates proposed by carriers be formulated or published by rate conferences. These facts, particularly the second, provide the primary basis for our resolution of the issues before the court.

Based on the existing record, the parties are in agreement that the action is ripe for summary judgment. We concur, not merely because of the cross-motions, but because we agree that the existing disputes among the parties and amici are ones of characterization and law, not of fact. Extensive briefing of the action has narrowed the issues to three: first, whether the defendants' activities are immunized from antitrust liability by the "state action" doctrine; second, whether the defendants are protected by the "Noerr-Pennington" doctrine; and finally, whether their practices, if unprotected, are antitrust violations as to which the court should now enter summary judgment. We resolve each of these in the government's favor and conclude that the defendants are in violation of the Sherman Act.

STATE ACTION IMMUNITY

The pivotal issue in this action is whether the challenged practice of collective rate publication falls within the category of private activities that are immune from the antitrust laws under the "state action" doctrine. This question has received by far the greatest attention from the parties in their extensive briefing of the cross-motions for summary judgment. Besides

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rates lower than their competitors' rates for identical service. *E.g.*, Statement of Material Facts, submitted in support of SMCRC's motion for summary judgment, filed Aug. 1, 1978, at 3, 4. By preserving the carriers' right of independent action, the subject states have permitted, to an admittedly limited degree, price competition. Within the range of rates that will be approved as just and reasonable, *see United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 499, 506, 55 S.Ct. 462, 79 L.Ed. 1023 (1935), the states do not impede the ability of the carriers to set prices competitively.

being central to the case, the issue is, we think, a particularly difficult one. Application of the state action doctrine may call for extended inquiry and analysis of a state's regulatory statutes and programs; of the mix of public and private participation in administrative decisions; and even, perhaps, of the economic theory underlying a legislative scheme. *See* L. Sullivan, *Handbook of the Law of Antitrust* 738 (1977). To an extent, our resolution of the question obviates the need for such extraordinary probing, for we will conclude that the absence of actual compulsion renders the state action doctrine unavailable to each of the defendants. Nevertheless, any venture into the twilight zone dividing the realms of uncontested state and federal sovereignty requires that the traveller proceed with extraordinary caution.

The state action doctrine begins with *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). California, by statute, had established a scheme whose admitted purpose was to maintain prices and restrict competition among raisin growers. The growers would develop, in combination, marketing and pricing programs which they would submit to a state commission for approval. The commission would sanction a program where it found, after a hearing, that the program would prevent agricultural waste without allowing excessive profits to the growers, and where the program was approved upon referendum by a requisite number of growers.

A raisin grower brought suit in federal court challenging the program, *inter alia*, as invalid under the Sherman Act. Chief Justice Stone rejected the challenge, holding that Congress, in enacting the Sherman Act, did not intend to prohibit state action regulating ecnonomic activity:

> Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone

> is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

317 U.S. at 352, 63 S.Ct. at 214 (citations omitted).

Unresolved by the decision in *Parker*—and perhaps unresolved to this day[6]—is the question whether the doctrine announced in that case would protect not only the state itself, but private parties acting under the state mandate. Read most conservatively, the quoted passage holds only that the state's immunity as a sovereign is not undermined by private participation in the state program. Yet the language also hints that

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[6] *See Bates* v. *State Bar of Arizona*, 433 U.S. 350, 361 n.13, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), noting that only four justices joined in that part of *Cantor* v. *Detroit Edison*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), holding *Parker* inapplicable to private defendants. In *Cantor*, however, Justice Stevens went on to suggest circumstances under which merely private conduct required by state law would still be exempt from the Sherman Act. Since his discussion of those circumstances was adopted by a majority of the court, the question of whether private parties are protected under *Parker* is largely mooted: a private party claiming "state action" exemption must always satisfy the stricter *Cantor* requirements.

the state may, in the exercise of its sovereignty, shelter individuals from antitrust liability, and that this immunity may in turn survive even where the private party has participated in the state's actions. Thus, *Parker* offered a basis for believing first, that a private individual acting at the command of a state sovereign could avoid the effect of federal antitrust laws, and second, that the individual's participation in bringing about the state action would not threaten his immunity thereunder.

Neither of these notions was significantly shaken in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). The Supreme Court held that enforcement of a price-fixing schedule by state and county bars was not exempt under *Parker* v. *Brown* because the activity was not compelled by the state:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign.

421 U.S. at 790, 95 S.Ct. at 2015. Thus, the court rejected the respondents' assertion that because their actions were "prompted" by the state, no antitrust liability could attach. Moreover, the court suggested that compulsion would not be the sole criterion, but that before the *Parker* doctrine afforded him safe conduct through the forbidden territory of anticompetitive practices, a private party might have to make a yet-unspecified additional showing:

> Here, we need not inquire further into the state-action question because it cannot fairly be said that the state of Virginia through its Supreme Court Rules required the anti-competitive activities of either respondent.

Precisely what would have to be shown in such a case was the subject of *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). Detroit Edison, an investor-owned public utility, operated under a regulatory scheme similar to those involved in this action. Detroit Edison would file tariffs for the sale of electric power with the Michigan Public Service Commission, which was empowered by state statute

"to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities." 428 U.S. at 584, 96 S.Ct. at 3114. The Commission would approve, modify, or reject the tariffs as filed. While Detroit Edison was free to propose modifications at any time, Michigan law forbade deviation from any tariff actually in force.

The Commission had approved one of Detroit Edison's tariffs containing a program of free distribution of standard-size light bulbs to customers. The petitioner, a retail druggist selling light bulbs, attacked the scheme as an illegal tying arrangement. The petitioner claimed the scheme allowed Detroit Edison to use its monopoly status in the electric power market to increase its power and reduce competition in the light bulb market. Detroit Edison answered that the program was protected under *Parker* and *Goldfarb*, because it was compelled by the state acting as sovereign.

As augured in *Goldfarb*, the court determined that the respondent's showing of formal compulsion was not enough. Justice Stevens' opinion for the court analyzed the state action in two sections. First, he held that *Parker* v. *Brown* only conferred antitrust immunity on the state agents acting in their official capacity. 428 U.S. at 590-91, 96 S.Ct. 3110. The language of *Parker*, Justice Stevens reasoned, was carefully chosen so as to exclude mere private parties claiming to be acting under compulsion of state law. 428 U.S. at 590-92 & n.24, 96 S.Ct. 3110.

Only three other justices joined in the portion of Justice Stevens' opinion holding *Parker* inapplicable to the Cantor facts. 428 U.S. at 581, 96 S.Ct. 3110. Backed by a majority of the court, however, Justice Stevens went on to suggest two instances where private conduct required by state law might still be exempt from the Sherman Act. First, Justice Stevens suggested that "it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command." 428 U.S. at 592, 96 S.Ct. at 3118. This

"unfairness" theory recognizes the predicament of the citizen caught between conflicting demands of independent sovereigns, but only where the conflict is real. Justice Stevens refused to find unfairness in the facts before him because the predicament with which the respondent might claim to be faced was largely illusory. The respondent could not claim to have "done nothing more than obey the command of [its] state sovereign," *id.*; Justice Stevens' perceptive analysis of the regulatory process revealed it to be "a blend of private and public decisionmaking" in which the element of participation in so significant as to render the notion of coercion inapplicable to a characterization of the individual's compliance. The tying arrangement had not merely been imposed upon the respondent by the state Commission. It was the respondent who conceived, developed, and proposed the program; who argued the program's merits before the Commission; and who chose not to exercise its ever-present right to petition the Commission for elimination of the program.

Justice Stevens also supposed that Congress did not intend to impose conflicting antitrust standards upon an area already pervasively regulated by the state. 428 U.S. at 595, 96 S.Ct. at 3119. Any private party seeking a defense under this "already regulated" theory, however, would necessarily face three obstacles:

> First, merely because certain conduct may be subject to both state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.

Id.

Each of these related considerations in part explained Justice Stevens' refusal to exempt the tie-in under the "already regulated" theory. Most significant was the fact that the Michigan regulatory scheme was not to any meaningful degree concerned with the sale of light bulbs. This peripheral market was an "essentially unregulated area:"

> The application of that standard to this case inexorably requires rejection of respondent's claim. For Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's light-bulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired.

428 U.S. at 598, 96 S.Ct. at 3121.

The court's willingness in *Cantor* to probe the degree of state interest and involvement has led to the generally-approved supposition that the state action doctrine implies a "requirement that the state's regulatory interest be evidenced by active supervision and a clear statement of intent to regulate" the alleged activity. *See United States* v. *Southern Motor Carriers Rate Conference*, 439 F.Supp. 29, 41 (N.D.Ga. 1977), *quoting* 81 Harv.L.Rev. 1, 229-47 (1976). The defendants have striven to present the five subject regulatory processes in a light that best demonstrates that this standard has been more than satisfied. They have pointed to the close scrutiny with which they contend the state commissions review proposed rates and to the central function which collective ratemaking purportedly plays in the overall system of rate proposal and review. MCMCA also emphasizes North Carolina's "little section 5(a)," which announces a state policy approving of collective ratemaking and exempting the conference activities from the North Carolina antitrust laws.

The government, on the other hand, refuses to concede what it insists is the pivotal state action question. The government

insists that as private parties, none of the defendants may invoke the state action doctrine without first showing that its challenged activities are compelled by the states acting as sovereigns. Nothing in any case decided after *Goldfarb*, the government argues, modifies this basic requirement, and regardless of the virtual romance between the states and their ratemaking conferences, no state *requires* that rates be published collectively.

At the outset, we note that even under a test that does not include state compulsion, the defendants face an uphill battle. The Supreme Court held in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 435-64, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) that collective setting of interstate railroad rates was not exempt from the antitrust laws merely because the Interstate Commerce Commission held power to approve the rates. And in *Cantor*, 428 U.S. at 596, 96 S.Ct. at 2120, the Court reasoned, "Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws." Moreover, even though rate publication generally may be more central to the regulatory schemes here than light bulb sales were in *Cantor*, the *collective* aspect of rate publication might prove peripheral. We need not decide the question here, however, for we agree with the government that compulsion by the state acting as a sovereign remains, as expressed in *Goldfarb*, a threshold barrier to application of the state action doctrine.

The first reason why compulsion is necessary is that this is the precise principle for which *Goldfarb* stands. The *Goldfarb* court found that further inquiry into the state action question was pretermitted by an absence of state compulsion. This holding, at least as it applies to private defendants, has been untroubled by subsequent decisions.

The defendants rely principally on *Cantor* in arguing that the compulsion requirement is less than absolute. Yet compulsion was the very starting point of that case. After holding *Parker* inapplicable to activities of private parties, Justice

Stevens considered the availability of analogous state action principles to a private defendant:

> In this case we are asked to hold that private conduct *required* by state law is exempt from the Sherman Act. Two quite different reasons might support such a rule.

428 U.S. at 592, 96 S.Ct. at 3118 (emphasis supplied). The court went on to enunciate the "unfairness" and "already regulated" concepts that might support state action protection. The court premised its discussion, however, on the fact that the tie-in arrangement was "required," by state law.

The debate between the majority and dissenting opinions took place within the context of a private party's undertaking of state-mandated practices, and it is this context which gives meaning to the debate. Justice Stevens, writing for the court, and Justice Stewart, writing for the three dissenting justices, focused upon two related themes. The first was the extent to which courts might inquire beyond the formality of state compulsion. Justice Stewart found compulsion sufficient to invoke state action immunity anytime a state approved or established a practice, where the effect of approval was to proscribe subsequent deviation. The regulatory process, he reasoned, was a three-step affair in which the private party proposes, the state decides, and the private party complies. Proposal was protected by the First Amendment principles expressed in *Eastern Railroad Conference* v. *Noerr Motors*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). Compliance was protected by *Parker* and *Goldfarb*. 428 U.S. at 624, 96 S.Ct. 3110.

Justice Stevens answered that this analysis was simplistic, for it ignored the reality that regulatory decision making is typically a process in which public and private input are continuously combined. Formal compulsion by the state, he argued, ought not be given automatic deference by the courts where the compulsion also lacked substance.

The second, related, debate in *Cantor* centered on notions of federalism. Justice Stewart contended that *Goldfarb* compulsion was sufficient to bar federal incursion into the state realm:

> *Goldfarb* clarified *Parker* by holding that private conduct, if it is to come within the state-action exemption, must be not merely "prompted" but "compelled" by state action. Thus refined, the doctrine performs the salutary function of isolating those areas of state regulation where the State's sovereign interest is, by the State's own judgment, at its strongest, and limits the exemption to those areas.
>
> Beyond this the Court cannot go without disregarding the purpose of the Sherman Act not to disrupt state regulatory laws.

428 U.S. at 637-38, 96 S.Ct. at 3140 (footnotes omitted).

The majority conceived of a more forceful application of federal law. The "already regulated" theory of immunity, for instance, was only to be invoked where confrontation was unavoidable, and even then did not constitute a rule of automatic deference:

> First, merely because certain conduct may be subject both to state regulation and to federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's;
>
> . . .

428 U.S. at 595, S.Ct. at 3120.

Each of these questions is given meaning in the context of state compulsion of private activity. The first challenges the genuineness of the coercion. Such an inquiry would be unnecessary—as it was in *Goldfarb*—were there no coercion to judge. Similarly, the federalism debate derives its intensity from the circumstances of opposing *demands* from discrete sovereigns.

Thus, the *Goldfarb* inquiry is not discarded by *Cantor*. The court must begin with the threshold determination of whether

the defendants' acts are "compelled by direction of the State acting as a sovereign." 421 U.S. at 791, 95 S.Ct. at 2015. Only where that milepost is reached may we test the extent of the state's involvement in the compelled activity.[7] In the case before the court, there is no such necessity; it is conceded by all sides that the practice of joint rate publication is not expressly required by any statute, regulation or other legislative or administrative command of any of the subject states. Though informally ratified and even encouraged by the procedures and pronouncements of the various regulatory agencies and, to a limited degree, by the states' laws themselves, the practice is nowhere compelled.

The parties have not produced, and we have not found, a single case decided subsequent to *Goldfarb* in which activities not required by the state were held immune under the state action doctrine. *See New Motor Vehicle Board* v. *Fox*, ___ U.S. ___, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). Indeed, the subsequent cases have tended to reiterate the compulsion requirement. *E.g.*, *Bates*, 433 U.S. at 359, 97 S.Ct. 2691.[8]

A related strain of cases might suggest a less stringent test. In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S.

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[7] For an excellent presentation of the pertinent inquiry in such a case, *see Sullivan*, *supra*, § 238 at 738-39.

[8] A review of existing authority on the state action doctrine suggests the necessity of specifying the meaning we ascribe to the notion of compulsion by the state. Professors Areeda and Turner have argued that courts ought not require state "compulsion" of a private activity as a prerequisite to invocation of the state action defense. P. Areeda & Turner, I *Antitrust Law* § 215 (1977). Over-application of the *Cantor* principle that many regulatory decisions are industry-initiated, these observors fear, may lead courts to find antitrust liability in circumstances where, unlike *Cantor*, the challenged private practice lies at the heart of the regulatory scheme. Areeda and Turner cite the facts in *Parker* to illustrate a situation in which

389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Court examined the extent to which *Parker* immunity was available to a city operating a municipal electric utility. The Court concluded:

> [T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.
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> . . .
>
> While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of

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industry participation in regulatory decision making should not render the state action defense unavailable.

Areeda and Turner, are employing a special definition of state "compulsion." They characterize both *Parker* and *Cantor* as cases in which there was not "compulsion," evidently based on the fact that the *impetus* for the state action came from the regulated entities.

The language of *Cantor*, and our discussion here, however, analyses compulsion differently. Justice Stevens specifically described the light bulb tie-in as "required." 428 U.S. at 592, 96 S.Ct. 3110. He then determined that such compelled activity might be protected under either an "unfairness" or an "already regulated" theory. In either case, the threshold compulsion that existed arose from the fact that state law *formally* required the tie-in by virtue of the Commission's having approved Detroit Edison's tariff: so long as there was no new filing, Detroit Edison had to continue the light bulb distribution program. It is only this minimal, formal, compulsion that we find to be a necessary element to a *Parker* defense.

> action complained of" [*City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976)].

435 U.S. at 413-415, 98 S.Ct. at 1137, 1138 (footnote omitted).[9]

City of Lafayette does announce a standard of state action immunity that protects activities "contemplated" by the state legislature, but confers this immunity only on state subdivisions. That a municipality should have to make a smaller showing than a private party is only natural, for the municipality is already a limited sovereign, exercising, to the extent conferred by the state, an array of governmental features and powers. The Court made this very point when it distinguished *Cantor*, pointing out that a municipality may claim to act "as an agent of the State." 435 U.S. at 411 n.40, 98 S.Ct. at 1135-36 n.40. Thus the standard governing the antitrust immunity accorded state subdivisions differs from, but does not modify, the rules applicable to a private party. *See also Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975).

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[9] Earlier in its opinion, the Court quoted, with apparent approval, the order of the Fifth Circuit:

> "A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent. 532 F.2d, at 434-435 (footnotes omitted).

435 U.S. at 393-394, 98 S.Ct. at 1126-27.

Finally, we realize that state compulsion might not always be an absolutely immutable requirement. The case may arise in which a regulatory or legislative scheme, while not explicitly requiring a particular act, is structured so as to render the act indispensable to compliance with the scheme. In this sense an anticompetitive activity may be protected because it is impliedly or constructively compelled by the state. We think, however, that this argument is foreclosed to the present defendants by *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S.Ct. 716, 98 L.Ed. 1051 (1945). That case held collective rate setting by railroads to be subject to the antitrust laws despite the regulation of railroad rates by the Interstate Commerce Commission. It is true that the cost-saving features of collective ratemaking, which obviate the need for each carrier to make an independent investigation into the economic factors affecting rates he should publish, may be more significant in the trucking industry. The defendants' memberships include many small businesses, which, unlike railroads, may be hard pressed to absorb the added expense incurred in making individual rate formulations. This, however, merely means that by imposing their respective regulatory systems upon the intrastate truckers, the subject states have increased the cost of doing business. The Sherman Act protects "competition, not competitors," *Brown Shoe, Inc.* v. *United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 82 L.Ed.2d 510 (1962), and the added fact that the state scheme adversely affects smaller shippers does not justify an antitrust exemption.

NOERR-PENNINGTON DOCTRINE

The defendants have devoted considerably less effort to advancing a *Noerr-Pennington* defense theory. The doctrine, briefly stated, holds that concerted action consisting solely of activities aimed at influencing public officials does not violate the Sherman Act.[10] The Supreme Court has expressly ex-

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[10] For a discussion by this court of the doctrine and its origins, see *United States* v. *Southern Motor Carriers Rate Conference*, 439 F.Supp. 29, 46-47 (N.D.Ga.1977). *See also Sullivan, supra*, § 238 at 740-43.

tended the doctrine to lobbying efforts before state administrative agencies. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The defendants argue that since all of their challenged activity is directed toward influencing the state commissions, no antitrust liability may attach.

The government answers that the complaint charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect, ostensibly pursuant to state sanction. Implicitly conceding that the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.

This case is not technically one to which *Noerr-Pennington* has traditionally been applied. *Noerr* and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. *See Sullivan, supra*, § 238 at 740. The parties have cited no cases in which courts have invoked *Noerr-Pennington* to immunize price fixing among competitors.

The First Amendment principles underlying *Noerr-Pennington* are nevertheless applicable by analogy. If the defendants may, in exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.

The difficulty with this analysis is that it ignores the teaching of *Cantor*. Justice Stevens' characterization of the regulatory process as a blend of public and private decision making illustrates that the regulatory industry does not merely propose, but also decides. Even though the proposals require

state sanction to take effect, the industry's participation in the process surpasses mere petitioning and renders the industry, in part, a decisionmaker.

This does not, of course, mean that *Noerr-Pennington* is inapplicable to rate making and related administrative activities. It does, however, suggest that a court may properly accord independent significance to the defendants' activities of rate formulation and proposal. First Amendment law has always recognized that even an activity which is itself communicative may nevertheless be penalized because of its non-speech aspects. *See, e.g., United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (draft card burning is conduct not protected by the First Amendment); *Cox* v. *Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (civil rights demonstration on a sidewalk opposite a courthouse is "speech plus," entitled to a lesser degree of protection than pure speech); *Teamsters Local 695* v. *Vogt*, 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347 (1957) (the state may prohibit picketing directed at achieving a union shop in violation of state law). Here, we agree with the government that the defendants' activities of collective rate formulation constitute independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine.

THE SHERMAN ACT VIOLATION

In *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), the Supreme Court held that collective rate publication by railroads constituted price fixing illegal under the antitrust laws even though the published rates were reviewed and approved by the Interstate Commerce Commission:

> [T]he Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the antitrust laws. Thus a "zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago*,

> *M., St. P. & P.R. Co.*, 294 U.S. 499, 506, 55 S.Ct. 462, 465, 79 L.Ed. 1023. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics. If the ratemaking function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone.

324 U.S. at 460-61, 65 S.Ct. at 728. Relying on *Pennsylvania Railroad*, the courts appear to have assumed that collective rate-making violates the Sherman Act. *See Pan American World Airways* v. *United States*, 371 U.S. 296, 305-06 & n.11, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963); *Marnell* v. *United Parcel Services of America, Inc.*, 260 F.Supp. 391, 404-05 (N.D.Cal.1966).

The *Pennsylvania Railroad* case leaves the defendants very little breathing room. They argue, however, that their activities do not violate the Sherman Act (1) because the states, rather than the defendants, determine the prices to be charged by intrastate carriers; and (2) because the defendants' activities, properly viewed under Rule of Reason analysis, do not unreasonably restrain trade.

Throughout their extensive briefing of this case, the parties have debated the correct characterization of the defendants' actions. The government contends that the defendants are responsible for fixing intrastate trucking rates, and that the state commissions furnish no more than a formal stamp of approval. The defendants insist that they only propose, and that the "fixing" of rates is performed exclusively by the commissions.

The cases establish a middle ground and have the effect of refuting the defendants' protestations of nonparticipation in regulatory decision making. As a consequence, the government is correct to describe collective rate publication as price "fixing:" this is precisely the language employed by Justice Douglas in the *Pennsylvania Railroad* decision. 324 U.S. at

460-61, 65 S.Ct. 716. Similarly, the state action cases have uniformly recognized that state participation in an anticompetitive scheme does not render the private party a non-actor. *See Cantor*, 428 U.S. at 592, 96 S.Ct. 3110; *Goldfarb*, 421 U.S. at 791 & n.21, 95 S.Ct. 2004.

Moreover, the practice of collective rate publication easily fits the classic description of a "naked price restraint." Since *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), it has been established law that price fixing among competitors is a *per se* violation of Section 1 of the Sherman Act. *See, e.g., Goldfarb; United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); *Hartford-Empire Co.* v. *United States*, 323, U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322 (1945). Because the guiding principle behind all Sherman Act jurisprudence is the protection of competition, *see United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 577, 19 S.Ct. 25, 43 L.Ed. 259 (1898), any arrangement whose purpose or effect is to inhibit price competition is illegal. Such an arrangement need not be outright cartelization, so long as it brings about, or is intended to bring about, the "raising, depressing, fixing, pegging, or stabilizing" of prices. *Socony-Vacuum*, 310 U.S. at 223, 60 S.Ct. at 844.

The defendants' activities have precisely such an effect. The very function they serve is to coordinate the rates that their member carriers will charge. Within the "zone of reasonableness" in which, free from regulatory interference, market forces would otherwise determine price, the defendants have displaced competition with concerted pricing decisions. In so doing, they violate the Sherman Act at its most sensitive spot. The defendants' practices of collective rate coordination and publication are *per se* violations of Section 1, subject to injunction by this court. *See White Motor Co.* v. *United States*, 372 U.S. 253, 259-60, 83 S.Ct. 696, 9 L.Ed.2d 738 (1960) (summary judgment is appropriate in *per se* price fixing cases) (dictum).

See also First National Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).[11] We will therefore GRANT the government's motion for summary judgment, holding that the defendants have violated Section 1 of the Sherman Act.

RELIEF

The arguments by the defendants and *amici* intimate that the relief sought by the government will significantly interfere with the regulation of intrastate trucking in the subject states. We are of course hopeful that whatever transition is necessitated by this order be effected in the least disruptive manner possible. At the same time, it is apparent that the transition will inevitably cause difficulties, and that these must not stand in the way of swift compliance with the Sherman Act. The court will therefore direct the parties to this action to confer in an attempt to reach agreement as to the proper relief to be afforded by the court.[12] Within thirty (30) days of the date of this order, the parties shall, if possible, submit to the court a joint agreement detailing the nature and precise terms of the relief to be awarded. If the parties are unable to reach an accord, they shall within the same thirty-day period: (1) so

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[11] Nor would we necessarily reach a different result under rule of reason analysis. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). Considerations such as the need of the smaller shippers for the supposed efficiencies accompanying collective rate formulation and the fact that current intrastate rates are materially lower than interstate rates in the subject states, while perhaps quite meaningful from a policy standpoint, would have only limited significance to our inquiry. The focus would continue to be on the effect of collective ratemaking on price competition among intrastate carriers.

[12] The court expects that amici will be allowed full participation in all negotiations among the parties.

notify the court; (2) indicate those matters as to which there is agreement; and (3) submit proposals from each side in the areas of disagreement. The court will refrain from ordering interim relief, but expects that the parties will diligently proceed in complying with this order.

Accordingly, the court hereby GRANTS the government's motion for summary judgment and DENIES the defendants' motions for summary judgment.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.*
Unit B
April 5, 1982.

No. 79-3741.

UNITED STATES of America,
Plaintiff-Appellee,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. and North Carolina Motor Carriers Association, Inc.,
Defendants-Appellants,

National Association of Regulatory Utility Commissioners,
Intervenor-Appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before HILL and FRANK M. JOHNSON, Jr., Circuit Judges and SCOTT**, District Judge.

FRANK M. JOHNSON, Circuit Judge:

In 1976 the United States instituted this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin the continu-

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

**Honorable Charles R. Scott, U.S. District Court Judge for the Middle District of Florida, sitting by designation.

ing violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by three rate bureaus. These defendants, Southern Motor Carriers Rate Conference, Inc. (SMCRC), North Carolina Motor Carriers Association, Inc. (NCMCA), and Motor Carriers Traffic Association, Inc. (MCTA), represent common carriers before the regulatory commissions of the states of Alabama, Georgia, Mississippi, North Carolina, and Tennessee. These rate bureaus perform three basic functions: (1) they provide a forum for competing member carriers to discuss and agree on rates for intrastate transportation of general commodities to be proposed to state public service commissions for approval; (2) they publish tariffs and supplements containing the rates on which the carriers agree; and (3) they provide counsel, staff experts, and facilities for the preparation of cost studies and other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions.[1] The government challenged the first of these functions as price fixing in violation of Section 1 of the Sherman Act.[2]

Deciding the case on cross-motions for summary judgment, the district court held defendants in violation of Section 1 and granted the government's motion. In so doing, the judge rejected defendants' arguments that their activities were immune under the state action doctrine or under the *Noerr-Pennington* doctrine and that their activities did not constitute an antitrust violation.

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[1] For further elaboration of the facts regarding the role of the rate bureaus, their relationship with the state regulatory commissions, and the general pattern of regulatory procedures in the five subject states, see the district court's carefully written opinion. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 476-78 (N.D.Ga. 1979).

[2] In the district court, the state attorneys general of the states of Alabama, Georgia, Mississippi, North Carolina and Tennessee participated as amici curiae. The National Association of Regulatory Utility Commissioners (NARUC) also was allowed to participate as an intervenor.

Two of the defendants, SMCRC and NCMCA, and the intervenor, The National Association of Regulatory Utility Commissioners, have filed this appeal. We affirm.

State Action Immunity

Appellants vigorously argue that their collective ratemaking falls within the "state action" exception to the antitrust laws. The Supreme Court first clearly articulated this exception in *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.2d 315 (1943). At issue in *Parker*, a suit against state officials, was an agricultural proration system established by a state statute authorizing a commission to impose marketing programs for raisins after petition by raisin growers and imposing penalties for failure to follow the programs. Federal antitrust law, the Court held, did not prohibit this system, for the Sherman Act was not intended to alter a state's action supplanting competition. The program at issue, established by "state command," was adopted and enforced by the state acting as sovereign. *See id.* at 352, 63 S.Ct. at 314. The Court explicitly noted that a state's mere authorization of parties to violate the Sherman Act or a state's participation with private parties in an agreement in restraint of trade would not insulate actions from the federal antitrust laws. *Id.* at 351, 63 S.Ct. at 313.

The particular issue regarding the state action exception that is crucial here is whether a private party may avail itself of the exception only if the state compels it to perform the disputed actions. Appellants assert that in *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Supreme Court eliminated any state compulsion prerequisite for private party invocation of the exception. We disagree with that assertion. Before we address the holding of *Midcal* itself, however, we believe that it would be worthwhile to elaborate on certain aspects of the exception that the Supreme Court has announced in cases since *Parker* that interpret what constitutes an act of the state as sovereign.

First, we believe that in cases prior to *Midcal* the Supreme Court has made clear that private parties can invoke the state action exception only if the state compels their actions.[3] In *Goldfarb* v. *Virginia State Bar Ass'n*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court struck down a minimum fee schedule the habitual violation of which would, according to the state bar association, raise a presumption of unethical conduct. Nothing that the bar association was not a state agency for the purposes at issue, the Court asserted that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign." *Id.* at 790, 95 S.Ct. at 2014. Similarly, in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 359-60, 97 S.Ct. 2691, 2696-97, 53 L.Ed.2d 810 (1977), the Court, though striking down a ban on lawyer advertising on First Amendment grounds, distinguished *Goldfarb* by finding that the challenged restraint was the "affirmative command" of the Arizona Supreme Court, the body wielding the state's power over the

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[3] In asserting that there is a state compulsion requirement, we do not mean to suggest that private parties may have no role in proposing mandatory state action. In *Parker* and *New Motor Vehicle Bd* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1979), the Supreme Court has made clear that an action may still be compelled by the state even though private parties petitioned for the state to consider requiring such action. *See also California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *but cf. Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 594 & n.31, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) (action not required by state even though required by state commission tariff if action proposed by private party and tariff applies only to that party, not to parties statewide). Once a state has adopted some policy, however, whether or not after a petition by a private party, private parties will be exempt from the antitrust laws only if the state requires some action pursuant to that policy.

practice of law, and so was " 'compelled by direction of the State as sovereign.' " *Id.* at 360, 97 S.Ct. at 2697 (quoting *Goldfarb*, 421 U.S. at 791, 95 S.Ct. at 2015). *See also Litton Sys., Inc.* v. *Southwestern Bell Tel. Co.*, 539 F.2d 418, 423 (5th Cir. 1976).

Second, the Supreme Court has not required that the state compel action of public institutions. In *Parker*, the state did not require a state commission to issue a mandatory program. Rather, it gave the commission the option of establishing the program after the petition of raisin growers. In *Bates* the Court specifically noted that its analysis differs substantially depending on whether the defendant is a public or private official or institution. *See also Community Communications Co.* v. *City of Boulder*, ___ U.S. ___, ___, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982) (suggesting mere state "sanction" of municipal action sufficient for invoking exception); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 n.40, 98 S.Ct. 1123, 1135 n.40, 55 L.Ed.2d 364 (1978) (plurality opinion) (same).

Third, an action purporting to be by the state as sovereign must further a clear state policy. The Supreme Court explored this requirement, which for private parties is in addition to the threshold state compulsion requirement, in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-98, 96 S.Ct. 3110, 3118-21, 49 L.Ed.2d 1141 (1976). At issue was a program of the Detroit Edison Co., a private defendant, approved by a state commission. Under the program, the company provided light bulbs without a charge separate from a customer's billings for electricity. The Court held that the program was not state action immune from the Sherman Act's purview. The Court found no necessary conflict between the state's regulation of the distribution of electricity and the federal interest in the competitive market for light bulbs. Moreover, noting that it would not find an exception unless required for the state regulatory program to function and then only to the minimum extent necessary, the Court found that Michigan's policy interest in regulating electricity would not be affected by the in-

applicability of the state action exception to the free light bulb program.[4] This consideration is equally applicable in suits against public defendants. In *Bates*, the Court, stating that for the purposes at issue the state bar was an agent of the state in enforcing a ban on advertising, specifically held *Cantor* inapplicable because "the regulation of the activities of the bar is at the core of the State's power to protect the public", 433 U.S. at 361, 97 S.Ct. at 2697, and the state policy was "clearly and affirmatively expressed". *Id.* at 362, 97 S.Ct. at 2698. *See also New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978); *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135 (plurality opinion).

Keeping in mind the three considerations present in the Supreme Court cases outlined above—the need for state compulsion of private defendants, for some lesser state directive for public defendants, and for a clear expression of state policy—we proceed to an analysis of *Midcal* itself. The statute at issue in *Midcal* required wine producers and wholesalers to file fair trade contracts or price schedules with the state. Wholesalers could not resell wine to retailers at prices below those on the contracts or schedules. The Supreme Court reviewed prior cases on state action immunity and held that they established a two-pronged standard. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively

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[4] The Court noted that it might find liability against a private party required to perform some action even if there was no clear state policy favoring the action if so finding would be unfair to the party, 428 U.S. at 594-95, 96 S.Ct. at 3119, and that it might not in all circumstances find that state policy concerns preempted federal antitrust law. *Id.* at 595, 96 S.Ct. at 3119. These concerns, however, arise only if the threshold state compulsion requirement is met. We find, in any event, no unfairness in this case in holding appellants to be in violation of the Sherman Act, *see* text at note 22, *infra*, and no state policy here strong enough to justify preempting federal antitrust law. *See* note 12, *infra*.

supervised' by the State itself." 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135 (plurality opinion)). California's regulatory system, the Court ruled, met the first prong but not the second; it therefore did not grant immunity from the antitrust laws.

At issue in this case is the meaning of the first prong of the standard.[5] We believe that this first prong of the *Midcal* standard did announce a broad, general standard for applying the state action exception, but that it merely is a general restatement incorporating earlier holdings that considered the exception as applied both to public and private defendants and with regard both to the need for state compulsion and for a clear articulation of state policy. By providing this broad overview the Court did not intend to alter the applicability of the exception in the particular contexts that the earlier cases had considered. In particular, the Court did not eliminate the requirement that the state compel action by private parties.

The correctness of our interpretation is evident on examination of the Court's opinion. First, there is not the slightest hint in *Midcal* that the Court no longer agreed with its earlier holdings. To the contrary, the Court cited those holdings with approval, even quoting *Goldfarb's* statement that "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign." 445 U.S. at 104, 100 S.Ct. at 942 (quoting 421 U.S. at 791, 95 S.Ct. at 2015). Indeed, the Court explicitly stated that its earlier decisions *established*

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[5] Neither in its brief nor at oral argument did the government take the position that the state regulatory commissions do not actively supervise the proposed collectively formulated rates through hearings to review the reasonableness of proposed tariffs. Moreover, the record evidence that the commissions routinely suspend the effectiveness of proposed tariffs and conduct hearings satisfies us that the second prong of the *Midcal* test has been met.

the standards announced in *Midcal*.[6] 445 U.S. at 105, 100 S.Ct. at 943. Second, the language the Court used to announce its standard, "clearly articulated and affirmatively expressed state policy", does not imply a departure from a compulsion requirement. Given the articulation of a general standard, there is no oddity in not mentioning in text the need for state compulsion in one particular application of the standard.[7] Moreover, in the context of private parties, we cannot see how

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[6] The Supreme Court, in a recent discussion of whether municipal action is state action exempt from antitrust oversight, has seemed to confirm that it views its decisions on state immunity as a continuum, rather than as establishing different standards before and after *Midcal*. *See Community Communications Co.* v. *City of Boulder*, ____ U.S. ____, ____, 102 S.Ct. 835, 848, 70 L.Ed.2d 810 (1982). Similarly, the Ninth Circuit recently has used the state compulsion requirement of *Goldfarb* in the context of applying the *Midcal* standards. *Ronwin* v. *State Bar of Arizona*, 663 F.2d 914, 918 (1981).

[7] In a footnote immediately following the articulation of its two-pronged standard in *Midcal*, the Supreme Court cited Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum.L.Rev. 898, 916 (1977), apparently as an example of the application of its standard. 445 U.S. at 105 n.8, 100 S.Ct. at 943 n.8. That Note, at the cited page, states that "[t]he mere fact that anticompetitive conduct by a private party effectuates a clearly articulated state regulatory policy is not in itself sufficient to justify a state action defense. . . . The defense is only available if the state has elected to effectuate its policy by *requiring* the private conduct under attack" (emphasis in original). The Court's citation to the Note is a testament to the continued vitality of the state compulsion requirement.

In footnote 8 the Court also cited *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011, 1018 (3d Cir. 1971), and *Asheville Tobacco Bd.* v. *FTC*, 263 F.2d 502, 509-10 (4th Cir. 1959). *Norman's* found a mandatory filing program insufficient alone for there to be state action immunity. In *Asheville*, the Court noted both the absence of required state action and of state supervision. Neither case is inconsistent with, and both implicitly support, a state compulsion requirement in certain circumstances.

there ever could be a clearly articulated and affirmatively expressed state policy in any case in which the state allows an individual to choose at his whimsy the option of doing or not doing some act. Finally, the Court has in earlier cases used language similar or identical to that adopted in *Midcal*. *See New Motor Vehicle Bd.*, 439 U.S. at 109, 99 S.Ct. at 411; *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135 (plurality opinion) (quoted in *Midcal's* articulation of its standard); *Bates*, 433 U.S. at 362, 97 S.Ct. at 2684. If the use of such language in earlier cases did not alter the state compulsion requirement, there is no reason to interpret the language in *Midcal* as altering the requirement.[8]

Having determined that the state compulsion requirement remains an element essential to private party invocation of the state action exception, we must resolve whether the state regulatory programs at issue compel joint rate formulation. North Carolina General Statute § 62-152.1(b) states that in

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[8] The dissent reasons that *Midcal* eliminates the state compulsion requirement because the basis for state compulsion is the concern that the economic self-interest of the companies might affect the rate setting process. According to the dissent, the second prong of the *Midcal* analysis, the requirement of state supervision, assuages that concern. We believe that *Midcal* itself illustrates the invalidity of the presumption that state compulsion and state supervision have the same rationale. If the dissent were correct, the Supreme Court would have upheld state action immunity on the facts of *Midcal*, for state supervision would have been unnecessary since the state requirement mandating the filing of contracts and schedules would serve the same purpose. The Court did not, however, so rule, and rightly, for the state does not deprive competitors of their ability to subvert competition merely by requiring them to collude. Rather, as noted earlier, the state compulsion requirement fulfills a purpose entirely different from that underlying state supervision: it reaffirms the holding of *Parker* that an action must in effect be by the state as sovereign. If private parties were able to choose whether to follow some course of action, the decision concerning whether to pursue that action hardly could be said to be by the state.

order to realize and effectuate the policy of uniform rates among carriers, any party to an agreement with other carriers regarding uniform rates may apply to a state commission for approval of the agreement; Section 62.152.1(h) relieves parties to an agreement so approved from the operation of the antitrust laws. The statute does no more than authorize or permit collective ratemaking. There is no compulsion. Tennessee Public Service Commission Rule 1220-2-1.40 adopts Section 5a of the Interstate Commerce Act, 49 U.S.C.A. § 10706(b), which permits carriers to file joint rates and exempts those who do file such rates from the antitrust laws. In addition, Tenn.Code Ann. § 65-1506 permits the Public Service Commission to establish joint ratemaking procedures.[9] Again, there is no state

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[9] It is perhaps ironic that the government seeks to enjoin as a violation of federal antitrust laws activity by motor carriers operating in *intrastate* commerce that is exempted from federal antitrust laws when performed at the *interstate* level. Appellant SMCRC attempts to elevate this irony into an argument for implied immunity from the antitrust laws. We reject this argument.

Under 49 U.S.C. § 10706, the collective formulation of rates by motor carriers operating in interstate commerce is exempt from federal antitrust laws once these rates are approved by the Interstate Commerce Commission. According to SMCRC, this express exemption should be extended to collective rate formulation at the intrastate level. As authority for this position, SMCRC relies on *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 597 F.2d 593 (7th Cir. 1979), which held that this section should be construed to exempt intrastate railroad collective ratemaking that affects interstate commerce. The result in *Atchison* is explainable, and clearly distinguishable from this case, on the ground that the ICC has jurisdiction under the Shreveport rate doctrine over intrastate *railroad* rates that affect interstate commerce. *See Houston East & West Texas Railway Co.* v. *United States*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1942). The ICC has no similar jurisdiction over intrastate motor carrier rates. Indeed, 49 U.S.C. § 10521(b) expressly reserves this area for state regulation.

In the alternative, SMCRC contends that the pervasive state regulation permitted by Section 10521(b) creates an irreconcilable

compulsion. Georgia Code Ann. § 68-613, which requires a state commission to "establish ratemaking procedures for all motor common carriers, which procedure shall include, but not be limited to, collective ratemaking procedures", explicitly indicates that Georgia intends to give carriers the option of filing rates jointly or individually.[10] A 1942 order of the Ala-

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conflict with federal antitrust laws which warrants an implied repeal of the antitrust laws in this situation. As SMCRC concedes, the implied repeal doctrine normally applies only to conflicts between federal antitrust laws and federal regulation, not to conflicts with state regulation. Moreover, the Supreme Court has observed repeatedly that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have been found only in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963). This presumption against implied repeal is just as strong where the conflict is with state regulatory policy. *Cantor*, 428 U.S. at 596-97 & nn.36, 37, 96 S.Ct. at 3120-21 & nn.36, 37. Even where such repugnancy is found, the antitrust laws are abrogated only to the extent necessary for the effective functioning of the regulatory scheme. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963).

We detect no irreconcilable conflict of the federal antitrust policy with either the Interstate Commerce Act, 49 U.S.C. § 10521(b), or with the existence of state regulation. As we noted above, the ICC has no jurisdiction over intrastate motor carrier rates. The Interstate Commerce Act then poses no conflict with the application of the federal antitrust laws to collective intrastate ratemaking among motor carriers. As to state regulatory policy, if an implied exemption is necessary for the effective functioning of the state scheme, the states may act to immunize private action taken in response to state policy by compelling private conduct as part of a clearly established or affirmatively expressed state policy.

[10] The State of Georgia, participating as amicus in the district court, presented a 1942 order issued by its public service commission stating that "all for hire motor common carriers operating under Class certificates be, and they are hereby, directed and required to

bama Public Service Commission requires carriers to "prepare, publish and file with the Commission an individual tariff or . . . participate in an agency issue." Record at 53. As with Georgia, Alabama explicitly permits individual rate applications. Finally, Mississippi in Miss.Code Ann. §§ 77-7-1 to -341 merely contemplates cooperation among carriers to the limited extent of establishing "joint rates."[11] This falls short of compelling joint applications for proposed rates. Having found that no state, the laws or regulations of which are at issue here, compels private parties to make joint ratemaking applications, we find the state action exception inapplicable.[12]

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publish and file with this Commission . . . *a tariff* containing all local and joint class and/or commodity rates applicable between points within Georgia." Record at 693. Pointing to the italicized language, the state argued that the commission "clearly directed all Class 'A' carriers to file a single joint tariff with the Commission," thus indicating its policy in favor of collective action. *Id.* We are not persuaded that the language of the 1942 order is susceptible of only this interpretation. At best it is ambiguous. Given the statute, only recently amended to insert the provisions outlined in text, it would not, in any event, be controlling.

[11] A "joint rate" is a single rate applied jointly by two carriers to cover a shipment in which one carrier operates over only part of the route and the other carrier serves the remaining distance to the destination.

[12] We note that, even if state compulsion were not a requirement after *Midcal*, we would still find the state action exception inapplicable here because of the absence of a clearly articulated and affirmatively expressed policy in favor of joint rate applications in any state at issue. In none of these states do the statutes do more than, at most, authorize joint rate agreements. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker* v. *Brown*, 317 U.S. 341, 344, 351, 63 S.Ct. 307, 310, 313, 87 L.Ed. 315 (1943). Moreover, *Cantor* indicates that, for a state to have a clear policy in favor of an action, that action must be essential to the functioning of the state regulatory system. 428 U.S. at 597-98. No

Noerr-Pennington Doctrine

Appellants next assert that, under the *Noerr-Pennington* doctrine,[13] antitrust sanctions may not be applied against them because their collective activities consist solely of protected attempts to influence public officials. We agree with the district judge's rejection of this argument and adopt in part the rationale of that court.

> The government answers that the complaint charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect,

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state's statutes or regulations indicate, nor does the evidence show, that joint rate agreements are necessary for state ratesetting procedures to work.

[13] In *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Supreme Court legitimated the joint efforts of businessmen to influence legislative or executive action, even though these efforts were designed to injure their competitors. In holding that this "combination" was not actionable under the Sherman Act, the Court stated:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Id. at 139, 81 S.Ct. at 530. Later in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the Court followed *Noerr* in the context of efforts by large mining companies and labor unions to persuade the Secretary of Labor to set wage rates at such high levels that the mines' smaller competitors would be driven out of business. "[J]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670, 85 S.Ct. at 1593. In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Court approved the notion that *Noerr's* protection extends to activities aimed at influencing administrative agencies.

ostensibly pursuant to state sanction. Implicitly conceding that the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.

This case is not technically one to which *Noerr-Pennington* has traditionally been applied. *Noerr* and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. The parties have cited no cases in which courts have invoked *Noerr-Pennington* to immunize price fixing among competitors.

467 F.Supp. at 484-85 (citation omitted).

Indeed the Court's discussion in the *Noerr* case itself lends support to the trial court's conclusion "that the defendants' activities of collective rate formulation constitute independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine." *Id.* at 485. In *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Court pointed to the "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act," such as combinations in which the participants "jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price fixing agreements." *Id.* at 136, 81 S.Ct. at 528.[14] Moreover, the kind of collective action at issue here seems at odds with the thrust of the *Noerr-Pennington* doctrine, which assures public to the channels of government policymaking. While the joint efforts of the bureaus to secure legislation or commission regulation permitting collective ratemaking procedures would clearly fall within the ambit of *Noerr* protection, inasmuch as it would seek to influence policy, collective action to determine

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[14] With respect to the right to petition aspect of the bureaus' claim, "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport*, 404 U.S. at 514, 92 S.Ct. at 613 (citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949)).

the rates which the bureaus desire the commission to approve is not of the same genre.

The Sherman Act Violation

Having found appellants not to be beyond the ambit of the Sherman Act, we must address directly whether their actions are violations of Section 1 of that Act. Appellants present two arguments: (1) that the practice of collective rate formulation does not constitute price fixing because the states, rather than the carriers, ultimately determine the rates to be charged; and (2) that the bureaus' activities must be evaluated under a rule of reason analysis, which dictates a finding that the bureaus did not unreasonably restrain trade.

As the district court observed, the power of the states, through their public service commissions, to review the reasonableness of proposed rates does not alter the essential anticompetitive nature and effect of a horizontal agreement among competitors regarding rates to be charged. In *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), the Supreme Court held that a combination among regulated railroads to fix rates stated a claim for price fixing under Section 1 of the Sherman Act, even though the Interstate Commerce Commission reviewed and approved proposed rates. The Court explicitly rejected the argument urged here by the rate bureaus.

> The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us . . . [E]ven a combination to fix reasonable and non-discriminatory rates may be illegal . . . . The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws.

Id. at 460, 65 S.Ct. at 727 (citation omitted).[15] Moreover, both the Reed-Bulwinkle Act, 49 U.S.C. § 10706, at the interstate

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[15] Appellants attempt to undercut the force of the Supreme Court's rationale by pointing out that in states such as North Carolina the

level and the state statutes extending state antitrust immunity to collective ratemaking at the intrastate level are premised on the recognition that, absent such immunity, this activity would contravene antitrust prohibitions on price fixing.[16]

Thus we agree with the district court that "the practice of collective rate publication easily fits the classic description of a 'naked price restraint.'" 467 F.Supp. at 486. Collective formulation clearly tampers with the price structure for intrastate transportation of general commodities; the rate bureau arrangement substitutes concerted pricing decisions among competing carriers for the influence of impersonal market forces on proposed rates. Such combinations traditionally have been condemned as illegal *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). It is irrelevant that, as the bureaus argue, the

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public service commission regulates not only the reasonableness of rates but also the collective agreement pursuant to which rate proposals are formulated. *See* N.C.Gen.Stat. § 62-152.1 (Cum.Supp.1981). In essence, appellants argue that the fact of state regulation not only renders their activities immune as state action but also precludes characterization of their activities as price fixing. They press the point even further by arguing that the regulatory context of this case mandates application of a rule of reason analysis. For reasons we shall discuss *infra*, we decline to accord such extensive significance to the impact of state regulation.

[16] The Interstate Commerce Commission has so viewed collective ratemaking agreements as to interstate activity.

> [W]hether an agreement will have anticompetitive effects is presumed. This presumption arises from the holdings of the Courts that the interests to be protected by the antitrust laws are always harmed by collective rate-making agreements and that agreements such as these violate the antitrust laws *per se* without official exemption.

Tidewater Coal Demurrage Agreement, 356 I.C.C. 66, 75 (1978). *See also* H.Rep.No. 1100, 80th Cong. 2d Sess. (1947), *reprinted in* [1948] U.S.Code Cong.Serv. 1844 (referring to the uncertainty as to the legality under the antitrust laws of such agreements).

state regulatory commissions' ultimate authority to determine which intrastate rates become effective deprives the bureaus of any real power directly to fix prices at a particular level. It is sufficient for Sherman Act liability if the purpose or the effect of the combination is that of "raising, depressing, fixing, pegging, or stabilizing the price." *Id.* at 223, 60 S.Ct. at 844. Here the rate bureaus cannot disclaim any purpose to inhibit competition among their member carriers in the fixing of proposed rates for the same service. Moreover, the effect of joint ratesetting is to reduce the amount of independent rate filing that otherwise would characterize the market process.

The appellants nevertheless argue that their conduct must be evaluated under a rule of reason analysis. We disagree. The bureaus' reliance on *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979),[17] in support of a rule of reason approach is misplaced. In *Broadcast Music* the Supreme Court refused to condemn the issuance of blanket licenses to copyrighted musical compositions by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) at fees negotiated by ASCAP and BMI as a form of price fixing *per se* illegal under the Sherman Act.[18] Influencing the

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[17] *Broadcast Music* was decided together with *American Society of Composers, Authors and Publishers* v. *Columbia Broadcasting System, Inc*

[18] The licensing scheme employed by both ASCAP and BMI followed a similar pattern. Owners of copyrighted works, who under copyright law alone possess the exclusive right to perform the work publicly for profit, grant the organization of which they are a member (ASCAP or BMI) a nonexclusive right to license performances of their work. A blanket license from ASCAP or BMI gives the licensee, for a flat fee or percentage of total revenues, the right to perform any and all of the compositions owned by members of the organization as often as desired for a stated term. The organization distributes royalties generated by the licenses among its members in a manner that reflects the nature and amount of use of their music.

Court's adoption of a rule of reason approach was its determination that the licensing scheme *achieved purposes unrelated to price formation*. The same cannot be said of the practice of collective rate formulation.

In *Broadcast Music* the Court reasoned: "The blanket license, as we see it, is not a 'naked restraint of trade with no purpose except stifling of competition,' . . . but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use." *Id.* at 20, 99 S.Ct. at 1562 (citations omitted). Because of the virtual impossibility of engaging in thousands of individual negotiations for the performing rights to copyrighted compositions, and the difficulty, from the user's perspective, of reporting uses and, from the copyright owner's perspective, of policing unauthorized performances, the blanket license arose as a practical necessity in the market for performing rights. It gave users unlimited access to BMI and ASCAP's repertory of copyrighted works and gave the owners reliable protection against infringement. *Id.* at 20-21, 99 S.Ct. at 1562-63. Thus, the blanket licensing scheme created a forum for linking buyers and sellers—*i.e.*, users and owners—and yielded improvements in the market for performing rights of copyrighted compositions which were unrelated to price. In contrast, the practice of joint formulation creates no market for trucking services that would not exist if individual carriers formulated their own proposed tariffs. The effect of the practice, if it has any at all, can only be on price formation. *See generally* L. Sullivan, Handbook of the Law of Antitrust § 59, p. 154, § 74 pp. 200-02 (1977).[19] The economic

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[19] *Broadcast Music* and its rule of reason approach are distinguishable on yet another ground. The Court noted that the blanket license offered by ASCAP and BMI was a product different from the license which could be offered by individual copyright owners since the former consisted of many individual compositions plus the aggregating services performed by the organization. Hence, ASCAP and BMI were sellers, separate from the copyright owners, in a product market in which individual composers could not compete. 441

advantages to the member carriers[20] cannot justify the inhibiting effect on price competition. *See id.* § 24, p. 203. Nor can the elimination of so-called destructive competitive practices justify it. *Socony*, 310 U.S. at 220-21, 60 S.Ct. at 842-43. Arguments based on economic efficiencies essentially resolve themselves into the contention that concerted decisionmaking rather than competition is preferable. *See* L. Sullivan, *supra*, § 74, p. 202. The policy of the Sherman Act is to the contrary.[21]

Appellants also urge consideration of the regulatory context of this case as sufficient reason to invoke a rule of reason analysis. Indeed, we have acknowledged that "consideration of federal and state regulation is proper in *certain instances* even after the issue of antitrust immunity has been resolved." *Mid-Texas Communications Systems, Inc.* v. *American Telephone and Telegraph Co.*, 615 F.2d 1372, 1385 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980) (citing *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 627, 94 S.Ct. 2856, 2872, 41 L.Ed.2d 978 (1975), and *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 360-61, 83 S.Ct. 1246, 1258-59, 10 L.Ed.2d 389 (1963)) (emphasis added). We

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U.S. at 21-23, 99 S.Ct. at 1563-64. The rate bureaus cannot be viewed analogously as purveyors of a product or service which could not be provided by their individual constituent member carriers.

[20] Asserted advantages include cost-savings in the formulation and publication of rate tariffs, which in turn enable small carriers, which lack the means to prepare and justify their own rate proposals, to remain competitive with large carriers.

[21] We are aware that our colleagues in the Ninth Circuit have declined to apply a *per se* rule to the setting by majority vote of maximum fees that physician members of foundations for medical care (FMC) may claim in full payment for health services they provide to policy holders of FMC-approved insurance plans. *Arizona* v. *Maricopa County Medical Society*, 643 F.2d 553 (9th Cir. 1980), *cert. granted*, 450 U.S. 979, 101 S.Ct. 1512, 67 L.Ed.2d 813 (1981). This result, we believe, is based on too broad a reading of the decision in *Broadcast Music*.

are convinced, however, that this is not one of those instances in which the fact of state regulation determines the standard by which we measure the anticompetitive effect of the challenged conduct and thus the ultimate issue of liability.

In declining to do so, we cannot be accused of being "so inflexible as to deny consideration of governmental regulation." *Id.* At every turn appellants have urged us to consider the impact of state regulation on the trucking industry—its impact on the availability of immunity, on the characterization of their conduct, and on the standard for measuring liability. We believe that on the facts of this case any deference to the impact of state regulation is appropriate only in determining whether the challenged conduct is immune under the state action doctrine.

We perceive appellants' arguments on the liability issue to have three possible, somewhat overlapping, connotations: that the impact of state regulation deserves consideration (1) because regulation is just another fact of market life to which they have responded, (2) because a state interest is at stake in the challenged conduct, or (3) because it is unfair to penalize action which is merely a response to state regulatory interests.

With respect to the first reason, treating state regulation as a fact of market life may be quite proper if regulation precludes the existence of factual predicates upon which antitrust liability hinges. Such was our concern in *Mid-Texas Communications*, in which we directed assessment on remand of the effect of regulation on the defendant's power to exclude competition in the relevant market (*i.e.*, on whether the defendant possessed monopoly power) and on defendant's alleged willful misuse of its monopoly power. 615 F.2d at 1386-90. Both the possession of monopoly power and its willful misuse are necessary to sustain a charge of illegal monopolization under Section 2 of the Sherman Act. *Id.* at 1385-86. In the context of price fixing allegations, however, the antitrust focus is not on market power, but on the purpose or effect of the combination. *Socony*, 310 U.S. at 221, 60 S.Ct. at 843. *See* L. Sullivan, *supra*, § 70, p. 192. Moreover, in cases in which courts have

regarded the impact of regulation on predicates to liability, the courts did not alter the standard for measuring liability, as appellants here urge us to do. *See Mid-Texas Communications Systems, Inc.* v. *American Telephone and Telegraph Company*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980); *International Telephone and Telegraph Corp.* v. *General Telephone and Electronics Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975) ("]T]he fact of regulation is significant, but not because it embodies a doctrinal scheme different from the antitrust law; the sole legal perspective is that afforded by the antitrust law.").

As for the second reason—the presence of a state interest in the challenged conduct—the state action doctrine is designed to vindicate that interest. Indeed, deference to the state interest and the sovereignty of the state is at the heart of that doctrine. Accordingly, we have considered above the impact of state regulation and have found no immunity. Deference to the state's interest should not be broadened to the extent that every antitrust concept, including the *measure* of liability, must accommodate the state's interest.

Finally, with respect to the fairness argument, we recognize that injustice may be done by allowing damage relief against a private defendant whose activity is a legitimate response to state legislation or regulation. Because the govenment has sought only injunctive relief against the appellants, this concern need not detain us. In addition, such fairness considerations apply more properly to the questions of immunity from liability[22] and the shaping of appropriate remedies and should not sway us to alter the standard of liability.

Accordingly, for the reasons stated the judgment of the district court is AFFIRMED.

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[22] *See* note 4, *supra; cf. Cantor*, 428 U.S. at 592-95, 96 S.Ct. at 3118-19 (discussing an unfairness theory as support for clothing private conduct required by the state with state action immunity); *Mid-Texas Communications*, 615 F.2d at 1380 ("Fairness to the regulated industry is an important factor . . . in determining whether antitrust immunity exists.").

HILL, Circuit Judge, dissenting:

I respectfully dissent from the majority's resolution of the issue of state action immunity. In evaluating the effect of *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), on this case, I am persuaded that it establishes a standard different from that applied by the district court[1] and that the majority has misinterpreted the *Midcal* standard. I would therefore reverse and remand in part for further consideration.

The central issue in this case—whether the practice of collective rate formulation employed by the rate bureaus is immune from antitrust attack under the state action doctrine—is one beset with difficulties. Of state action immunity it is well said that "[u]nlike many other phantasmagoria of the law, we know it is there, but it is hard to define precisely what it is, and, unlike obscenity, we do not always know it even when we see it." Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 Nw.U.L.Rev. 31, 31 (1979). Moreover, the Supreme Court's decision in *Midcal* has not removed all the uncertainties in this area, for the parties dispute both the meaning and the application of the standards set forth in *Midcal*. Finally, sensitive policy considerations influence the choices to be made. On the one hand there is the strong policy in favor of competition that underlies the federal antitrust laws. On the other are the right of the states to engage in economic regulation and all the federalism implications which the potential conflict between state and federal regulation may generate.

In *Midcal*, after reviewing the line of cases following *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the

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[1] *Midcal* was decided after the district court had entered final judgment in this case. Hence the district court did not have the benefit, as do we, of the Supreme Court's pronouncement on this subject.

Supreme Court set forth two standards for determining when the state's involvement is sufficient to justify immunity of the challenged conduct. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.)). Thus, whether the defendant be a state or state instrumentality or a private party,[2] *Midcal* directs that the focus for immunity purposes must be upon the extent of the state's involvement in the challenged restraint—that is, upon the kind of imprint of state authority the anti-competitive activity bears.

Midcal examines the extent of the state's involvement at two levels—first, at the level of articulation of a state policy in favor of the challenged restraint and second, at the level of implementation of that policy through active supervision. Significant state involvement at both levels is necessary to justify exemption of the anticompetitive conduct under the state action doctrine. Hence the balance that the Supreme Court has struck between the federal policy of competition and the states' sovereignty is this: the state may choose to displace competition with economic regulation by making clear its intention to do so; once it has made that choice, however, the state bears

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[2] In announcing its two-pronged test in *Midcal*, the Court purported to derive it from the *Parker* line of cases, citing cases involving private defendants, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), as well as cases involving governmental defendants, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), and *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978).

the burden of ensuring that this policy is furthered and that it remains the ultimte decisionmaker.[3]

In testing the actions of private parties under *Midcal* standards, I am convinced that state compulsion of the private activity, as set forth in *Goldfarb*, is not a *sine qua non* for

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[3] There may be substantive limits on what conduct the state may immunize by making the challenged restraint a state policy. Indeed, there is some suggestion in Supreme Court precedent that federal antitrust laws do place substantive limits on the content of state economic regulation. *See, e.g., Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (invalidating a Louisiana fair trade statute containing a "non-signer" provision under which a retailer could be enjoined from knowingly underselling another retailer whose prices were set under a resale price maintenance contract, exempt from antitrust laws under the Miller-Tydings Act, with a supplier). *But see* 1 P. Areeda & D. Turner, Antitrust Law 70 (1978) (interpreting this decision as an inadequate supervision case). *See generally* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L.Rev. 693 (1974). Those limits may be reached in areas, unlike the private utility regulation involved here, that have not traditionally been regulated by the states.

Fortunately, we are not called upon here to delineate those boundaries. At least one member of the Supreme Court and some commentators have urged an express preemption analysis, which involves the difficult weighing of the state interest at stake against the federal interest in a competitive economy. *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 605, 96 S.Ct. 3110, 3124, 49 L.Ed.2d 1141 (1976) (Blackmun, J., concurring); Posner, *supra;* Note, Parker v. Brown *Revisited: The State Action Doctrine After* Goldfarb, Cantor, *and* Bates, 77 Colum.L. Rev. 898, 929-30 (1977) (suggesting that a preemption analysis explains the Court's result in some of the cases in the *Parker* line). *But see Cantor*, 428 U.S. at 627, 96 S.Ct. at 3134 (Stewart, J., dissenting) (warning that a preemption approach is a return to the discarded substantive due process doctrine). *Cf. Community Communications Co.* v. *City of Boulder*, ___ U.S. ___, ___, 102 S.Ct. 835, 845, 70 L.Ed.2d 810 (1982) (Rehnquist, J., dissenting) (arguing that state action should be analyzed as a

clothing private conduct with state action immunity. It is on this point that the majority and I differ. To state the point more plainly, state compulsion is not the *only* way to satisfy the first prong of the *Midcal* test; such compulsion is merely the best evidence that the challenged restraint is a "clearly articulated and affirmatively expressed" state policy.

Support for this interpretation of *Midcal* may be found in the language of that opinion. The resale price maintenance scheme established by the California statute *required* of wine wholesalers, on pain of fines or of license suspension or revocation, adherence to the pricing scheme. 445 U.S. at 100, 100 S.Ct. at 940. In concluding that the first prong of the *Midcal* test had been satisfied, however, the Court did not track the *Goldfarb* language and reason that the first prong was met because the state "compelled" resale price maintenance. It chose instead to say: "The legislative policy is forthrightly stated and clear in its purpose *to permit* resale price maintenance." *Id.* at 105, 100 S.Ct. at 943 (emphasis added).

Moreover, I believe that the function served by the *Goldfarb* compulsion requirement is served as well by the *Midcal* formulation. Where private parties are involved to any extent in the state's scheme of economic regulation, there is properly a concern that the economic self-interest of those parties may infect the decisionmaking process and result in harmful anticompetitive activity. Such private self-interest does not warrant the cloak of state action immunity. By requiring that a state actively supervise the implementation of its economic policy, the *Midcal* test ensures that the *state* has determined that the challenged activity is in furtherance of the *state's* policy. Hence the second prong of *Midcal* addresses the con-

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preemption problem). The Court, however, has never forthrightly adopted this approach, and, for the present, it appears to have resolved the tension between federalism and antitrust concerns on the side of federalism, albeit with the requirement of active state supervision of the anticompetitive activity. *Midcal* thus reiterates the federalism concerns at the heart of *Parker*.

cern in *Goldfarb* by ensuring that the state does not abdicate its responsibility to private parties.[4] When the state ceases to be the real party in interest by abandoning control over a segment of its economy to private parties, the sovereignty of the state cannot be said to be impaired by withholding state action immunity.[5] Thus the *Midcal* test preserves to the states the freedom to pursue state regulatory policies free of antitrust sanctions without at the same time permitting the purely economic self-interest of private parties to disrupt the forces of competition.

Finally, Professor Areeda's views are in accord with the interpretation I have placed on *Midcal's* effect on the *Goldfarb*

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[4] Professor Areeda has suggested that *Midcal's* active supervision requirement is inapplicable to governmental defendants. Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv. L. Rev. 435, 445 n.50 (1981) ("A few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active supervision of *private* parties) to require state supervision of *governmental* defendants."). In *Community Communications Co.* v. *City of Boulder*, the Supreme Court expressly declined to decide whether the active supervision criterion must be met by a municipality with respect to the challenged ordinance. ___ U.S. ___, ___ n.14, 102 S.Ct. 835, 841 n.14, 70 L.Ed.2d 810 (1982). If that criterion serves the function identified above, Professor Areeda's suggestion would appear correct.

[5] The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

1 P. Areeda & D. Turner, Antitrust Law 73 (1978) (footnotes omitted).

compulsion requirement. In discussing the *Goldfarb* and *Cantor* cases, Areeda has commented:

> Compulsion . . . should not be read as an independent requirement for state action immunity; rather, its presence or absence should serve only as strong evidence about state intent. Admittedly, however, some doctrinal confusion exists on this point.
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> . . . .
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> The Supreme Court and lower courts have not applied the compulsion language literally. In *Midcal* . . . , the Court defined the critiria for immunity *not in terms of compulsion* but in terms of supervision and articulated state policy; the emphasis on supervision implies public scrutiny, deliberation, and review, but *not command*.

Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv.L.Rev. 435, 438 & n.19 (1981) (citation omitted) (emphasis added). He went on to explain the result in *Goldfarb* and *Cantor* (no immunity) as hinging not on absence of compulsion but on absence of meaningful state participation in the challenged conduct. *Id.* n.19.

In applying the *Midcal* test as I understand it to the facts of this case, I think it clear that at least the states of North Carolina, Tennessee, and Georgia have policies favoring collective rate formulation by the rate bureaus.[6] As to the remaining states, I would remand the case to the district court for further development of the factual record and for evaluation under the *Midcal* test.

By legislative enactment the state of North Carolina has clearly endorsed collective rate formulation as a means for achieving the goals of its public service commission. Section 62-152.1(b) of the North Carolina General Statutes provides:

> For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the

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[6] As indicated by the majority, *see* note 5 *supra* in the majority opinion, the government did not contend on appeal that the active supervision requirement has not been satisfied.

> same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this commission and party to *an agreement between or among two or more carriers relating to rates*, fares, classifications, divisions, allowances or charges . . . or rules and regulations pertaining thereto, or *procedures for the joint consideration*, initiation or establishment thereof, *may under such rules and regulations as the commission may prescribe, apply to the commission for approval of the agreement* . . . .

The effect of such commission approval is set out in section 62-152.1(h).

> Parties to any agreement approved by the commission under this section and other parties are . . . hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with the terms and conditions prescribed by the commission.

These North Carolina provisions parallel the provisions of the Interstate Commerce Act which exempt from *federal* antitrust laws agreements concerning collective ratemaking among motor carriers opeating in interstate commerce. Moreover, they unmistakably indicate that collective rate formulation is part of the regulatory policy of the state of North Carolina. I would therefore hold the joint ratemaking activities of the rate bureaus in that state immune.

Likewise, I would hold the activities of the appellants in Tennessee immune under the state action doctrine. By express commission regulation Tennessee has made clear its intention to permit and encourage collective rate formulation. Rule 1220-2-1-.40 of the Tennessee Public Service Commission states:

> The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures for the

> joint consideration, initiation or establishment thereof as set forth by the Interstate Commerce Commission in § 5a of the Interstate Commerce Act [now codified as 49 U.S.C. § 10706(b)], are hereby adopted by the Tennessee Public Service Commission; provided, however, that the final determination on any rates, fares, classifications, divisions, allowances, charges, rules and regulations or procedures shall be left in its final determinations to the Tennessee Public Service Commission.

In addition, Tennessee has reiterated its policy in favor of collective action by the carriers by a 1980 amendment to its Motor Carrier Act which vests the Tenneseee Public Service Commission with power to establish collective ratemaking procedures. Tenn.Code Ann. § 65-1506 (Cum.Supp.1981). All carriers who are party to a collective ratemaking agreement must comply with these procedures.

With respect to Georgia, that state has recently amended its Motor Common Carrier Act of 1931 to require its public service commission to "establish ratemaking procedures for all motor common carriers, which procedure shall include, but not be limited to, collective ratemaking procedures for the joint consideration, initiation and establishment of such rates and charges." Ga.Code Ann. § 68-613 (Cum.Supp.1981). All motor common carriers subject to the commission's authority are "required to comply with such ratemaking procedures." *Id.* This legislative pronouncement convinces me that state action immunity would be available to the appellants' activities in Georgia.

The state of Alabama presents a more difficult question. In the proceedings in the district court, Alabama referred to a 1942 order of its public service commission as evidence that collective rate formulation is a clearly articulated and affirmatively expressed state policy. On April 20, 1942, the Alabama Public Service Commission ordered that certain motor carriers "prepare, publish and file with the Commission an individual tariff, or . . . *participate in an agency issue.*" Record at 53. It is unclear whether "agency issue" indicates that carriers may publish their tariff through an agent or that carriers may jointly formulate the rates to be proposed in their

tariffs. The term is not defined in the record. I would therefore remand to the district court for further development of the record to determine whether the rules and regulations of, or the enabling legislation governing, the Alabama Public Service Commission clearly articulate a policy in favor of collective formulation by carriers.

Finally, as with Alabama, whether the policy of the state of Mississippi conforms to the "clearly articulated and affirmatively expressed" standard in *Midcal* is unclear from the record developed prior to this appeal. A review of the statutory scheme, Miss.Code Ann. §§ 77-7-1 to -341 (1972), contemplates cooperation among the carriers to the limited extent of establishing joint rates. This falls short, however, of a clear policy in favor of joint formulation of any proposed rates. Nor did Mississippi present any rules or regulations of its public service commission which might reveal such a policy. I would therefore remand for further development of the record as to Mississippi and for decision by the district court in light of what I deem to be the appropriate construction of *Midcal*.

For the above reasons, I dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit.*
Unit B
June 7, 1982

No. 79-3741.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., and North Carolina Motor Carriers Assoc., Inc.,
Defendants-Appellants,

National Association of Regulatory Utility Commissioners,
Intervenor-Appellant.

Appeals from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 5, 1982, 5 Cir., 672 F.2d 469).

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, HATCHETT, ANDERSON, and THOMAS A. CLARK, Circuit Judges.

BY THE COURT:

A member of this Administrative Unit of the Court in active service having requested a poll on the application for rehearing

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* Former Fifth Circuit case, Section 9(3) of Public Law 96-452—October 14, 1980.

en banc and a majority of the judges in this Administrative Unit in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Administrative Unit of the Court en banc *with oral* argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
Unit B
April 11, 1983.

No. 79-3741.

UNITED STATES of America,
Plaintiff-Appellee,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., and North Carolina Motor Carriers Association, Inc.,
Defendants-Appellants,

National Association of Regulatory Untility Commissioners,
Intervenor-Appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, HATCHETT, ANDERSON and THOMAS A. CLARK, Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

In November 1976 the United States instituted this action under Section 4 of the Sherman Act, 15 U.S.C.A. § 4, to enjoin the continuing violation of Section 1 of the Sherman Act, 15 U.S.C.A. § 1, by three rate bureaus. These defendants, Southern Motor Carriers Rate Conference, Inc. (SMCRC), North Carolina Motor Carriers Association, Inc. (NCMCA), and Motor Carriers Traffic Association, Inc. (MCTA), represent common carriers before the regulatory commissions of the states of Alabama, Georgia, Mississippi, North Carolina, and Tennessee. The rate bureaus perform three basic functions: (1) they provide a forum for competing member carriers to discuss

and agree on rates for intrastate transportation of general commodities to be proposed to state public service commissions for approval; (2) they publish tariffs and supplements containing the rates on which the carriers agree; and (3) they provide counsel, staff experts, and facilities for the preparation of cost studies and other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions.[1] The government challenged the first of these functions as price fixing in violation of Section 1 of the Sherman Act.

The district court granted the government's motion for summary judgment and held that defendants were in violation of Section 1. The court rejected arguments[2] that defendants' activities were immune under the state action doctrine or under the *Noerr-Pennington* doctrine. Defendants SMCRC and NCMCA and intervenor NARUC appealed, and a panel of the former Fifth Circuit affirmed. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. Unit B 1982). The Court en banc voted to rehear the case to consider two issues: first, whether a private party may avail itself of the state action exception to federal antitrust laws only if the state compels it to perform the disputed actions; and second, whether, if state compulsion is not necessary, the state policies here at issue were sufficiently clearly articulated and affirmatively expressed for the state action exception to apply.

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[1] For further elaboration of the facts regarding the role of the rate bureaus, their relationship with the state regulatory commissions, and the general pattern of regulatory procedures in the five subject states, see the district court's carefully written opinion. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 476-78 (N.D.Ga.1979).

[2] In the district court, the state attorneys general of the states of Alabama, Georgia, Mississippi, North Carolina, and Tennessee participated as amici curiae. The National Association of Regulatory Utility Commissioners (NARUC) also was allowed to participate as an intervenor.

We hold that compulsion is required of private parties and thus do not reach the second issue. Accordingly, we affirm the judgment of the district court.

The Supreme Court first clearly articulated the "state action" exception to the antitrust laws in *Parker* v. *Brown*, 317 U.S. 341, 53 S.Ct. 307, 87 L.Ed. 315 (1943). At issue in *Parker*, a suit against state officials, was the applicability of the Sherman Act to an agricultural proration system established by a California statute authorizing a commission to impose marketing programs for raisins upon the petition of raisin growers. Once the program was approved and instituted by the commission, participation by the growers was mandatory; under the statute, growers who refused to follow a program once instituted were subject to fines and imprisonment. *Id.* at 347, 63 S.Ct. at 311-312.[3] Analyzing the intent of Congress in enacting the Sherman Act, the Court concluded that, insofar as the Act applied only to "persons," Congress intended application of the Act to the "business combinations" of "individuals and corporations." *Id.* at 351, 63 S.Ct. at 313-314. The Act was not, therefore, intended to "restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51, 63 S.Ct. at 313. Congress made no mention of states, and "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351, 63 S.Ct. at

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[3] Appellants seek to characterize *Parker* as a case in which individual growers were not compelled to act anticompetitively, citing a provision of the program which permitted growers to set aside up to 30% of their crops for sale on the free market. The 30% set-aside provision, however, did not affect the ability of a grower to elect not to participate as to the remaining 70% of his crops. In this sense, the state mandated the participation of every grower and compelled the challenged anticompetitive behavior.

313.[4] Applying this analysis to the California program, the Court reasoned that the Sherman Act was not intended to apply to the state of California in its establishment of a program operating under "state command." "The state in adopting and enforcing the prorate program," the Court concluded, "made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352, 63 S.Ct. at 314. The Court's opinion in *Parker* therefore established the state action issue as a question of whether the challenged acts could be attributed to the state as sovereign.

The fact that the Court in *Parker* concluded that Congress did not intend to restrain anticompetitive acts attributable to states of course did not mean that only states could assert a state action defense. Thus, while *Parker's* holding applied to state party defendants, the Supreme Court in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), suggested that a defense of state action may also be available to private parties under certain limited circumstances. *Goldfarb* was a class action against the Virginia State Bar and a Virginia county bar association in which the Court considered the validity under the Sherman Act of a minimum fee schedule for lawyers published by the county bar association. After determining that the county bar association was not a state agency,[5] the Court addressed the "threshold inquiry" of

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[4] Significantly, this reference to federalism concerns was directed not to any limitation on Congress' power to act; instead, it was stated merely as a rule of statutory interpretation—that is, whether and to what extent Congress had chosen to override existing state regulation.

[5] The State Bar was, for "some limited purposes," a state agency. 421 U.S. at 791, 95 S.Ct. at 2015. But because the fee schedule itself was published by the county bar association, we agree with those who characterize *Goldfarb* as an action against a private party. *Cf. Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53

whether the bar association's "activity is required by the State acting as sovereign." *Id.* at 790, 95 S.Ct. at 2015. The county bar association had argued that its action was "prompted" by the state, but a unanimous Court held that this was not enough for a state action defense. Rather, the action must be "compelled by direction of the State acting as a sovereign." *Id.* at 791, 95 S.Ct. at 2015. Deciding that the state of Virginia did not require the publication of minimum fee schedules, the Court stated that it "need not inquire further into the state-action question," *id.* at 790, 95 S.Ct. at 2015, and held that the challenged action was not state action for Sherman Act purposes.

After *Goldfarb*, the question remained as to what wold be required in addition to the threshold compulsion requirement for a finding of state action for private parties. This question was partially answered the next term in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed. 2d 1441 (1976). At issue in *Cantor* was a program in which Detroit Edison—a private defendant—provided light bulbs to its electricity customers without a separate charge. Detroit Edison could not discontinue its program, the Court stated, without the approval of a Michigan state commission, and in this sense the threshold compulsion requirement was at least formally satisifed. *See id.* at 592, 96 S.Ct. at 3118 ("In this case we were asked to hold that private conduct *required by state law* is exempt from the Sherman Act." (emphasis added)); *id.* at 594, 96 S.Ct. at 3119.[6] As *Goldfarb* had hinted, however, compul-

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L.Ed.2d 810 (1977) (antitrust claims raised only against state bar, which was a state defendant).

[6] In determining whether compulsion is present, we do not believe that private parties may have no role in proposing mandatory state action. In *Parker* and *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1979), the Supreme Court made it clear than an action still may be compelled by the state even though private parties petitioned the state to consider requiring such action. *See also California Motor Transp. Co.* v. *Trucking Unli-*

sion alone was not enough, particularly in *Cantor*, where "there can be no doubt that the option to have, or not to have, such a program is primarily [Detroit Edison's], not the [State's]," *Id.* at 594, 96 S.Ct. at 3119, and where the state was neutral as to the desirability of providing the light bulbs. Noting that it would not find an exception to federal antitrust law unless one was required for the state regulatory program to function, a majority of the Court concluded that Michigan's policy interest in regulating electricity would not be affected by the inapplicability of the state action doctrine.[7] Thus, although Detroit Edison's action was formally commanded by the state, the Court declined to grant the company state action immunity where no significant state interest would be undermined by enforcement of federal antitrust law. This discussion as to the factors necessary for private party invocation of the state action doctrine is, however, for the most part not at issue in the present case. It is enough for our purposes that the Court premised its discussion on the fact that Detroit Edison's action was "required" by the state. *Id.* at 592, 96 S.Ct. at 3118. In fact, although there were four separate opinions in *Cantor*,

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mited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). In *Cantor*, formal compulsion was present despite the fact that Detroit Edison could with little difficulty have petitioned the state commission for discontinuance of the program which the company itself had proposed. Thus, by compulsion we mean something less than that envisioned by some commentators. *See e.g.*, 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 215 (1978). Still, once a state has adopted some policy, whether or not after a petition by a private party, private parties will be exempt from the antitrust laws only if the state requires some action pursuant to that policy.

[7] In a prior part of the opinion (Part II) Justice Stevens, joined only by three other members of the Court, concluded that *Parker* should be limited to suits against state officials.

none of the Justices questioned the continued validity of *Goldfarb's* requirement—which had been imposed by a unanimous Court—that a private party must first meet the compulsion requirement as a threshold matter.[8]

In our view, the analytical basis for *Golafarb's* compulsion requirement for private parties traces its roots directly to the analysis in *Parker*. The lesson of *Parker* is that the legislative history and wording of the Sherman Act point to the conclusion that Congress wished to restrain the anticompetitive actions of "persons," that is, "individuals and corporations." Thus, an anticompetitive action undertaken by a private party necessarily is proscribed by the Sherman Act unless for some reason that action cannot fairly be attributed to the private party. Under *Goldfarb*, when a state compels the private party to act, it deprives him of his freedom of choice; his action, being mere obedience, cannot be described as individual action and must therefore be attributed to the state. The Court elaborated on this freedom of choice analysis in *Cantor* after reviewing Supreme Court cases involving state action immunity:

> In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.

428 U.S. at 593, 96 S.Ct. at 3119. This reasoning also explains the Court's statement in *Parker* that a state may "not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful,"

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[8] The disagreement in the Court centered on what in addition to compulsion was required for state action immunity for private parties. In fact, Justice Stewart, joined by Justices Powell and Rehnquist, argued that Michigan's decision to adopt Detroit Edison's proposal and then compel compliance with it should have been by itself sufficient for state action immunity.

317 U.S. at 351, 63 S.Ct. at 314, and its statement in *Cantor* that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity," 428 U.S. at 592-93, 96 S.Ct. at 3118-3119 (footnotes omitted). So long as the state merely allows, but does not compel, anticompetitive conduct, the decision to adopt such conduct remains that of the individual and is within the scope of the Sherman Act. Regardless of how strongly a state may wish to remove private action from the Act's jurisdiction, it will not succeed unless it structures a program so as to make individual actions the actions of the state itself—by means of the mechanism of compulsion.[9]

A necessary corollary of the rationale of *Goldfarb* and *Cantor* is that compulsion should not be required of state defendants. Regardless of their motives for undertaking anticompetitive behavior, states are nevertheless acting as states.[10] Since *Goldfarb*, the Court has consistently pointed out that the analysis of state action differs substantially depending on whether the defendant is a private party or a public institution. *See e.g.*, *Bates*, 433 U.S. at 361, 97 S.Ct. at 2697-2698 (*Cantor* would have been an "entirely different case" had the action been against a public offical or public agency rather than against a private party); *Cantor*, 428 U.S. at 600-601, 96 S.Ct. at 3122-3123 (plurality opinion) (noting that *Parker* might have been different had there been a private defendant); *id.* at

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[9] Another rationale for the compulsion requirement is that if a private party is permitted by the state to make the choice whether or not to compete, there is no necessary conflict between state and federal law because the private party may comply with both federal and state law at the same time.

[10] We acknowledge that *Bates* and *Parker*, which involved state defendants, discussed the presence of compulsion, but we view those cases—as appellants would have us do—as instances in which the presence of compulsion provides the best evidence of clear articulation and affirmative expression of state policy to displace competition.

585-92, 96 S.Ct. at 3115-3118 (distinguishing *Parker* as case against public officials). The same analysis applies to municipalities, at least when they act as agents of the state. Thus, the Supreme Court has not required compulsion for municipalities, but has held that when a state indicates its intention that the municipality may act as an instrumentality of the state—i.e., when the state "sanctions" anticompetitive behavior of the municipality—a state action defense may be available to the municipality. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413, 98 S.Ct. 1123, 1136-1137, 55 L.Ed.2d 364 (1978) (plurality opinion).

Under the foregoing analysis of the state action doctrine, we have little difficulty in holding that the activities of appellants are not immune from Sherman Act coverage. Specifically, a defense of state action fails because this litigation was brought against private defendants and none of the states in question compels the ratemaking bureaus to set rates collectively.[11]

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[11] The district court found that "regardless of the virtual romance between the states and the ratemaking conferences, no state *requires* that rates be published collectively." 467 F.Supp. at 483 (emphasis in original). An analysis of each state's policies reveals the correctness of the district court's finding. North Carolina General Statute § 62-152.1(b) states that in order to realize and effectuate the policy of uniform rates among carriers, any party to an agreement with other carriers regarding uniform rates may apply to a state commission for approval of the agreement; Section 62-152.1(h) relieves parties to an agreement so approved from the operation of the antitrust laws. The statute does no more than authorize or permit collective ratemaking. There is no compulsion. Tennessee Public Service Commission Rule 1220-2-1.40 adopts Section 5a of the Interstate Commerce Act, 49 U.S.C.A. § 10706(b), which permits carriers to file joint rates and exempts those who do file such rates from the antitrust laws. In addition, Tenn.Code Ann. § 65-1506 permits the Public Service Commission to establish joint ratemaking procedures. Again, there is no state compulsion. Georgia Code Ann. § 68-

Because the anticompetitive practices challenged by the government are undertaken at the individual election of the carriers and the rate bureaus, appellants fail to pass the threshold test established in *Goldfarb*. Thus, appellants' action cannot be said to constitute state action.

Appellants, however, urge that the state action analysis has been changed in their favor by the recent Supreme Court decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminimum, Inc.*, 455 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). *Midcal* involved a challenge under the Sherman Act to a California statute that required wine producers and wholesalers to file fair trade contracts or price sche-

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613, which requires a state commission to "establish ratemaking procedures for all motor common carriers, which procedure shall include, but not be limited to, collective ratemaking procedures," explicitly indicates that Georgia intends to give carriers the option of filing rates jointly or individually. The State of Georgia, participating as amicus in the district court, presented a 1942 order issued by its public service commission stating that "all for hire motor common carriers operating under Class A certificates be, and they are hereby, directed and required to publish and file with this Commission . . . *a tariff* containing all local and joint class and/or commodity rates applicable between points within Georgia." Pointing to the italicized language, the state argued that the commission "clearly directed all Class 'A' carriers to file a single joint tariff with the Commission," thus indicating its policy in favor of collective action. *Id.* We are not persuaded that the language of the 1942 order is susceptible of only this interpretation. At best it is ambiguous. Given the statute, only recently amended to insert the provisions outlined above, it would not, in any event, be controlling. A 1942 order of the Alabama Public Service Commission requires carriers to "prepare, publish and file with the Commission an individual tariff or . . . participate in an agency issue." As with Georgia, Alabama explicitly permits individual rate applications. Finally, Mississippi in Miss. Code Ann §§ 77-7-1 to -341 merely contemplates cooperation among carriers to the limited extent of establishing "joint rates." This falls short of compelling joint applications for proposed rates.

dules with the state. Under the statute, wholesalers could not resell wine to retailers at prices below those on the contracts or schedules. In order to evaluate whether the state defendant California Department of Alcoholic Beverage Control was state action immune, the Court briefly reviewed several of the state action cases discussed above and then stated that "[t]hese decisions establish two standards for antitrust immunity under *Parker*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 [98 S.Ct. 1123, 1135, 55 L.Ed.2d 364] (1978) (opinion of Brennan, J.)." 445 U.S. at 105, 100 S.Ct. at 943. California's regulatory system, the Court ruled, met the first standard but not the second; it therefore refused to hold that the state defendant's activity was outside the coverage of the Sherman Act. Applying *Midcal* to the facts in the present case, the government and appellants agree that each state actively supervises the collective ratemaking process,[12] so the second *Midcal* standard is satisfied. As to the first *Midcal* standard, the parties disagree concerning the importance of the fact that none of the five states compels the challenged anticompetitive activity. Appellants assert that, despite the lack of compulsion, their actions meet the first standard. This is because the Supreme Court allegedly abandoned the practice established in *Goldfarb* of requiring compulsion of private parties, as evidenced by the fact that the first standard did not specifically refer to compulsion. We disagree with appellants' argument for several reasons.

Initially, we question the very premise upon which appellants' argument is based—that the specific choice of wording in *Midcal* implies a rejection of a compulsion requirement for

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[12] The government points out that the district court conducted no fact-finding as to this issue. The record, however, reveals that the state commissions conduct hearings to review the reasonableness of proposed carrier tariffs and routinely suspend their effectiveness.

private parties. In the context of private parties, the first *Midcal* standard makes sense only if it includes a compulsion requirement. This is because we do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to the private party to carry out that policy or not as he sees fit. Our interpretation of the disputed passage in *Midcal* is that it should be read as a broad, general restatement of the Court's earlier holdings; the absence of any mention of compulsion in one specific application of the standard—that is, to private parties—therefore does not strike us as unusual. One additional factor points to the conclusion that the Court's choice of wording in *Midcal* does not imply a rejection of its prior holdings. The Court introduced the two standards with the statement that the prior decisions "establish" the standards, 445 U.S. at 105, 100 S.Ct. at 943, thus indicating that it did not view them as anything new. Furthermore, the Court used similar or identical language in earlier cases. *See New Motor Vehicle Bd.*, 439 U.S. at 109, 99 S.Ct. at 411-412; *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135 (plurality opinion); *Bates*, 433 U.S. at 362, 97 S.Ct. at 2698. If these cases did not alter the standard for state action immunity for private parties, we see no reason to believe that *Midcal* did.

Our interpretation of *Midcal* is supported by the consideration that that case had nothing to do with the applicability of a state action defense to a private party. *Midcal* involved an action by a wholesale distributor of wine for a writ of mandate for an injunction against the Califoria Department of Alcholic Beverage Control—a state agency.[13] Because, as we said earlier, *Parker* immunity for state defendants does not require compulsion, it makes sense that the Court did not require compulsion of the state Department.[14] Moreover, because the

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[13] In the Supreme Court, petitioner California Retail Liquor Dealers Association had appealed the case as an intervenor.

[14] In any event, compulsion was in fact present in *Midcal*. *See* 445 U.S. at 100, 100 S.Ct. at 940.

Court's holding against state action immunity in *Midcal* was grounded on the fact that the second standard, requiring active state supervision, was lacking, it is not surprising that the Court did not articulate a standard designed to encompass every conceivable state action case. The Court's citation to *City of Lafayette*—a non-private party case—immediately after listing the two standards further evidences that the Court's focus was only on cases involving public defendants. The Supreme Court recently agreed with our reading of this passage, referring to *Midcal* as having adopted the principle "that anticompetitive restraints *engaged in by the state municipalities or subdivisions* must be 'clearly articulated and affirmatively expressed as state policy' in order to gain an antitrust exemption. *Midcal*, 436 U.S. at 105 [100 S.Ct. at 943]." *Community Communications Co.*, 455 U.S. at 51 n. 14, 102 S.Ct. at 841 n. 14 (emphasis added). The fact remains that the only two state action cases in the Supreme Court to date involving private defendants have applied the threshold compulsion requirement.[15]

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[15] Appellants cite several lower court cases in support of their position, but only two of them actually found that private parties were immune without compulsion by the state. The first, *Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*, 475 F.Supp. 711 (D.D.C.1979), *aff'd per curiam*, No. 79-1658 (D.C.Cir. 1980), *cert. denied*, 450 U.S. 914, 101 S.Ct. 1355, 67 L.Ed.2d 339 (1981), a district court opinion, is of only limited relevance because in that case the court reviewed a governmental restraint involving a private party (and a state defendant) rather than, as here, a private restraint approved by the government. In the second case, *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir. 1982), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982), in which the Ninth Circuit reviewed an antitrust challenge to a private agreement allocating horse racing dates between two race track operators, the state had by statute specifically reserved the right to perform the allocation in the event that the private parties could not agree. *Id.* at 816. Thus, although the state did not compel the private parties to enter into the racing date agreement, it had effectively ensured that the anticompetitive conduct would occur one way or another.

Appellants suggest that their view of the state action doctrine does not really constitute a significant change from prior law, arguing that *Goldfarb* would have come out the same way under their reading of *Midcal* because in *Goldfarb* the minimum fee schedule lacked even state authorization. Such speculation, however, ignores the fact that the Supreme Court in *Goldfarb* could not possibly have been more clear in imposing a compulsion requirement on private parties. The very basis of the Court's holding was that compulsion was lacking; having made that determination, the Court reached no other issues, including whether the state had authorized the bar association's action. More importantly, reading a compulsion requirement out of the private party state action doctrine would require a complete reformulation of the theoretical foundations for state action first established in *Parker*. Under the view of federalism espoused in *Parker* and followed in *Goldfarb* and *Cantor*, the Court's inquiry focuses on the wording and intent of the Sherman Act in determining whether private action is mere obedience to a state command and therefore effectively the action of the state itself. Under appellants' view of federalism, on the other hand, Congress' explicit legislative determination to reach the conduct of "individuals and corporations" may be overridden by a state's decision to implement a voluntary supervision scheme that permits but does not compel anticompetitive behavior.[16] Even if such a

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[16] Appellants reason that the Court eliminated the compulsion requirement because the basis for state compulsion is the concern that the economic self interest of private parties might affect the rate setting process and, according to appellants, the second standard in *Midcal*—the requirement of state supervision—assuages that concern. They assert that a supervision requirement adequately ensures that the state has determined that the challenged activity is in furtherance of the state's policy and that the state does not abdicate its responsibility to private parties. We disagree with this analysis. If the second *Midcal* standard accomplished as much as appellants claimed, there would have been no need for the first standard. Further, if compulsion and supervision served the same purpose, the

view of federal-state relations could be supported, its adoption would require at least some explanation or discussion. In *Midcal* there was none. Additionally, appellants' view of state action for private parties would raise extremely difficult practical questions of interpretation and application. For example, appellants presumably do not dispute the continued validity of the Court's statement in *Cantor* in 1976 that state authorization, approval, encouragement, or participation in restrictive private conduct does not confer antitrust immunity. *See* 428 U.S. at 592-93, 96 S.Ct. at 3118-3119. Yet appellants' interpretation of *Midcal* would have us find antitrust immunity where a state grants private parties the option of participating in a scheme of state supervision. If there is a significant difference between these two schemes, it eludes us. Thus, in light of the significant theoretical and practical difficulties that a reformulation in state action doctrine would create, we are not inclined to infer such a reformulation from a Supreme Court opinion which is completely silent on the subject.

Supreme Court would have upheld, rather than denied, state action immunity in *Midcal* because compulsion was present in that case. *See* 445 U.S. at 99-100, 100 S.Ct. at 940-941. That the Court did not reach this result is evidence that supervision and compulsion serve different purposes. In our view, both supervision and compulsion are necessary for a finding of state action. A state cannot deprive competitors of their ability to subvert competition merely by compelling them to formulate collective rates. Conversely, active supervision of anticompetitive conduct undertaken at the voluntary election of a private party also is not by itself adequate. For example, a state may by regulation supervise the reasonableness of rates, but the reasonableness of any particular rate may have little to do with whether it was arrived at anticompetitively. A state regulatory system does not even necessarily have the regulatory power to supervise anticompetitive behavior if the resulting rate falls somewhere within the zone of reasonableness. As we stated earlier, compulsion serves an entirely different purpose from supervision: as *Goldfarb* and *Parker* established, the compulsion inquiry is to determine whether the specific anticompetitive activity at issue was actually that of the state acting as sovereign.

The final reason why we conclude that *Midcal* does not represent a rejection of a compulsion requirement for private parties is found in the language of the opinion itself. The Court chose to cite *Goldfarb* with approval, and even quoted from it to the effect that "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities *must be compelled* by direction of the State acting as a sovereign." 445 U.S. at 104, 100 S.Ct. at 943 (quoting 421 U.S. at 791, 95 S.Ct. at 2015) (emphasis added). Moreover, in a footnote immediately after setting out the two standards for state action immunity applicable to that case, the Court cited a student note in which the only argument contained at the cited page was that private action must be compelled by the state in order for the private party to invoke state action immunity.[17]

In addition to arguing that *Midcal* represents a rejection of a compulsion requirement for private parties, appellants also rely on various policy arguments against affirming the judg-

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[17] The mere fact that anticompetitive conduct by a private party effectuates a clearly articulated state regulatory policy is not in itself sufficient to justify a state action defense against injunctive relief. The defense is only available if the state has elected to effectuate its policy by *requiring* the private conduct under attack.

Note, *Parker* v. *Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 Colum.L.Rev. 898, 916 (1977) (emphasis in original). The Note at the end of the relevant section was even more definite. "To summarize, a state action defense against injunctive relief should be available for private conduct only if the state has specifically required the conduct in question without abdicating final decisionmaking authority to private parties." *Id.* at 918.

The same footnote in the *Midcal* opinion also cited *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011, 1018 (3d Cir. 1971), and *Asheville Tobacco Bd.* v. *FTC*, 263 F.2d 502, 509-10 (4th Cir. 1959), in which state action defenses were refused. Although both cases are ambiguous as to the requirements for state action, neither one implies that compulsion is not necessary for private parties.

ment of the district court. Even if we were not bound by the Supreme Court's decisions in *Goldfarb* and *Cantor*, we would find these arguments unpersuasive.

Appellants argue first that competition is undermined by a state action requirement that allows states to eliminate competition completely but not to maintain a policy that gives parties the choice of whether or not to compete. But the rationale of the state action doctrine is federalism, not the maximization of competition. As we stated earlier, it is the source of the decision not to compete—not the extent of competition—which determines whether state action exists.[18] Unless it is the state rather than the individual or corporation that decides to act anticompetitively, a state action defense would be inconsistent with the wording and intent of the Sherman Act.

Appellants also urge that if we uphold the injunction against collective ratemaking and require competition among carriers, carriers will face the burden of additional expense in preparing individual rate filings. They also assert that the ability of state regulators to perform their task will be undermined. Even if these assertions were supported in the record,[19] they would be irrelevant to proper antitrust analysis. Appellants' objections amount to the argument that competition does not work well, so the antitrust laws should not apply. This argument has consistently been rejected by the Supreme Court. *See Nation-*

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[18] Thus, a state may exempt a specific subclass of carriers from regulation or, as in *Parker*, it may predetermine a set amount or type of activity that may remain in the free market. In both of these cases, the state controls and sets the terms of the individual decision as to whether to compete. But where the option to compete or join a system of state regulation at all is up to the private party, state action does not exist.

[19] We note that the government did not seek to enjoin the rate bureaus from performing joint rate studies or from undertaking joint publication of individual rates and agreements involving two or more parties who provide joint service.

al Society of Professional Engineers v. *United States*, 436 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22, 60 S.Ct. 811, 842-843, 84 L.Ed. 1129 (1940). Moreover, if collective ratemaking is as desirable as appellants insist, then it should be but a small step for the states to compel it of all carriers. This latter point underscores a critical element of the state action issue. Congress has instructed courts not to treat lightly overt collusion by private parties in setting prices. Permitting states to confer antitrust immunity on private parties who voluntarily elect state regulation would, in our view, open the way for the creation of large loopholes in federal antitrust law, loopholes shows contours would be difficult to contain. If a state wishes to displace federal antitrust laws, it should be permitted to do so only if it speaks in the clearest and strongest possible terms—by compelling private parties to submit to its own regulatory system.

For the reasons stated above, we conclude that the district court properly decided that appellants were not entitled to claim state action immunity. On application for rehearing en banc appellants suggest no fault with the panel's determination that the Sherman Act was violated or that the *Noerr-Pennington* doctrine does not apply to the challenged activities. Accordingly, we reinstate that part of the panel opinion dealing with these issues, 672 F.2d 469, 476-81 (5th Cir. 1982)[20] and AFFIRM the judgment of the district court.

JAMES C. HILL, Circuit Judge, with whom R. LANIER ANDERSON, III, and THOMAS A. CLARK, Circuit Judges, join dissenting.

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[20] We also agree with the panel's determination that there is no implied immunity from the antitrust laws resulting from the antitrust exemption granted motor carriers under 49 U.S.C.A. § 10706, or from the existence of pervasive state regulation permitted by 49 U.S.C.A. § 10521(b). *See* 672 F.2d at 475 n.9.

Once again, I respectfully dissent from the court's ruling that compulsion is an essential element of state action immunity when a state action defense is raised by a private defendant. I write not to profess great admiration for the existence of a state action exemption to federal antitrust laws, but rather to uphold what the Supreme Court has clearly articulated to be the status of the law in this area. The majority view that the Supreme Court could not possibly have meant what it said in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), seems presumptuous at worst, and unsound policy as it pertains to the facts of this case at best. The *Midcal* test is clear and explicit. It should not be ignored simply because a different conclusion can be reached by reexamining the same line of cases already analyzed by the Supreme Court. In addition, the arbitrary nature of the compulsion requirement imposed by the majority today will significantly interfere with state trucking regulation. Like the federal government, the states interested in this litigation have adopted a sound program of regulation which embraces both the cost benefits of collective ratemaking and the added measure of competition that is preserved by permitting individual rate submissions. A compulsion requirement, as defined by the court, precludes such regulation—no matter how clearly the state's policy may be expressed and supervised.

The principal flaw in the majority's position is not that it misinterprets the line of cases developing the doctrine of state action immunity. The court's analysis leading to its conclusion that compulsion is an essential element of the immunity for a private defendant certainly is plausible. However, the Supreme Court reached a different conclusion after examining the same line of cases, and the structure of the federal court system demands that we adhere to its ruling.

After reviewing the state action cases commencing with *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court set forth two standards for determining when the state's involvement is sufficient to jus-

tify immunity for the challenged conduct. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943 (citing *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.)). In reaching this conclusion, the Court did not limit its analysis to those cases involving only state defendants, but instead examined all of its major decisions construing the state action exemption. The Court began its analysis for focusing on the state's involvement in the challenged restraint in light of the fact "[t]hat immunity for state regulatory programs is grounded in our federal structure." 445 U.S. at 103, 100 S.Ct. at 942. *Parker*, it argued, "found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against 'individual and not state action,' . . . state regulatory programs could not violate it." *Midcal*, 445 U.S. at 104, 100 S.Ct. at 942 (construing *Parker*, 317 U.S. at 352, 63 S.Ct. at 314).

Using *Parker* as its foundation, the Court went on to evaluate several recent decisions applying *Parker's* analysis. The line of cases discussed in this portion of *Midcal* include those involving private defendants, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), as well as those involving governmental defendants, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). After discussing each of these cases, a *unanimous* Court concluded that "[t]hese decisions establish two standards for antitrust immunity under *Parker* v. *Brown*," and proceeded to enunciate the two-part test set forth above. 445 U.S. at 105, 100 S.Ct. at 943. The Court did not purport to restrict application of its test to governmental entities; nor did it purport to derive the substance of its test from those cases involving governmental defendants. Indeed, as evidenced by

the facts of the present case, to have drawn such a distinction on the basis of the identity of the defendant would have proven unreasonable and inconsistent with the federalism concerns underlying the doctrine.

When a state enacts a regulatory scheme characterized by a clearly articulated state policy and active and effective supervision over implementation of that policy, but its policy is that of permissive joint ratemaking, the state's policy will be undermined whether governmental entities or private participants are the subject of the lawsuit; few private companies will be foolish enough to participate in valid and constructive state programs when such participation is clouded by the threat of antitrust liability.[1] As Justice Stewart noted in *Cantor*,

> If *Parker* v. *Brown* . . . could be circumvented by the simple expedient of suing the private party against whom the State's "anticompetitive" command runs, then that

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[1] There may be substantive limits on what conduct the state may immunize by making the challenged restraint a state policy. Indeed, there is some suggestion in Supreme Court precedent that federal antitrust laws do place substantive limits on the content of state economic regulation. *See, e.g., Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (invalidating a Louisiana fair trade statute containing a "non-signer" provision under which a retailer could be enjoined from knowingly underselling another retailer whose prices were set under a resale price maintenance contract, exempt from antitrust laws under the Miller-Tydings Act, with a supplier). *But see* P. Areeda & D. Turner, *Antitrust Law* ¶ 212 at 70 (1978) (interpreting this decision as an inadequate supervision case). *See generally* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L.Rev. 693 (1974). These limits may be reached in areas that have not been traditionally regulated by states.

Here, however, the states are involved in a type of private utility regulation. The ability to regulate motor carriers involved in intrastate activites not only is a traditional state regulatory function, but also is an authority conferred on the states by the Congress. 49 U.S.C.A. § 10521(b) (West Supp.1982).

> holding would become an empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties.

Cantor, 428 U.S. at 616-17 n. 4, 96 S.Ct. at 3130 n. 4 (Stewart, J., dissenting). *Cf. id.* at 604, 96 S.Ct. at 3124 (Burger, C.J., concurring)(for *Parker* purposes, focus should be "on the challenged *activity*, not upon the identity of the *parties* to the suit."); *City of Lafayette*, 435 U.S. at 420, 98 S.Ct. at 1140 (Burger, C.J., concurring in part and dissenting in part) (same). "The *Parker* state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principal that States posses a significant measure of sovereignty under our Constitution." *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 842, 70 L.Ed.2d 810 (1982); *see also Parker*, 317 U.S. at 351, 63 S.Ct. at 313-314.[2] That sovereignty is subverted when federal law prohibits private companies from participating in well-developed and actively supervised state programs.

Unlike an arbitrary compulsion requirement, the *Midcal* test affords states greater flexibility in the formation of constructive regulatory programs so long as the state clearly and affirmatively expresses its intent to do so and remains continuously and actively involved. *Midcal* demands a very high degree of state involvement before state action immunity may be claimed. The Court did not purport to expand application of the doctrine, or to overrule *Goldfarb*. Instead, *Midcal* simply clarifies that the focus for immunity purposes should be upon

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[2] In *Parker* the Court concluded that "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 351, 63 S.Ct. at 313. The state action doctrine therefore was enacted to effectuate Congressional intent that state restraints on competition would not be prohibited. However, "[t]here is nothing to indicate that the Congress of 1890 intended to leave state-compelled restraints intact but to subject state-authorized restraints to antitrust." M. Handler, *Reforming Antitrust Laws* 64-65 (1982).

the extent of the state's involvement in the challenged activity—that is upon the kind of imprint of state authority the anticompetitive activity bears. Compulsion certainly remains a relevant factor in this determination. Indeed, it is the best evidence that a challenged restraint is a "clearly articulated and affirmatively expressed" state policy. As Professor Areeda has observed, after *Midcal*, "literal compulsion is powerful evidence, if not determinative, of the existence of state policy, but is neither necessary nor sufficient for *Parker* immunity." P. Areeda, *Antitrust Law* ¶ 212.5 at 62 (Supp.1982); *see also Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 823 n. 8 (9th Cir.) *cert. denied*,— U.S. ____, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982). *See generally* M. Handler, *Reforming Antitrust Laws* 64-65 (1982); Page, *Antitrust, Federalism, and the Regulatory Process: A reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L.Rev. 1099, 1122 n. 141 (1981).

Nevertheless, the majority insists that compulsion must be the litmus test for the first prong of *Midcal* for a nongovernmental defendant. It relies primarily upon the fact that *Midcal* did not expressly overrule the compulsion language in *Goldfarb*. Admittedly, *Goldfarb* does suggest that as the state action exemption was developing the Supreme Court anticipated that some type of compulsion might be incorporated into the doctrine.[3] The Court's early references to compulsion,

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[3] At least one commentator has suggested that "[t]he compulsion requirement was an overreaction to the facts presented in *Goldfarb*, where the conduct challenged was actually contrary to the pronouncements of the state, and in *Cantor*, where the state agency never addressed the practice involved in any meaningful manner." M. Handler, *supra* at 64. Professor Areeda also agrees with this assessment.

> Indeed, *Goldfarb* and *Cantor* may be readily explained as decisions resting not on the absence of compulsion, but rather on the absence of any sort of meaningful state participation in the challenged conduct. In *Goldfarb*, the defendants were private groups enforcing fee schedules without adequate state authority

however, were ill-defined and were not restricted to cases involving private defendants. As noted in footnote ten of the majority's opinion, compulsion was discussed in both *Bates* and *Parker* wherein governmental defendants were the subject of antitrust scrutiny. Scholars and lower courts also were uncertain about the nature of the compulsion requirement and whether it was a requirement at all.[4] In *Midcal*, however, the Supreme Court reviewed its earlier treatment of compulsion, and concluded that the state action doctrine had developed to the point where a single test could provide the necessary analysis and satisfy the concerns articulated in *Goldfarb*. Thus, as the Ninth Circuit already has observed, "It appears that the statement in *Goldfarb* regarding compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervsion by the state itself. 421 U.S. at 788-91, 95 S.Ct. at 2013-2015." *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 823 n. 8 (9th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2038, 73 L.Ed. 2d 1308 (1982).

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or supervision. The essence of *Cantor* was the state's presumed indifference to the utility's "free" light bulb program; state approval, even if deliberate, was not intended to displace the antitrust laws.

Areeda, *Antitrust Immunity for "State Action" After LaFayette*, 95 Harv.L.Rev. 435, 439 n. 19 (1981).

[4] Prior to *Midcal*, Professors Areeda and Turner observed that the precise meaning of the compulsion test and its role in determining immunity was left unclear by *Goldfarb* and *Cantor*. 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 215 at 93 (1978); *accord Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*, 475 F.Supp. 711, 724-25 (D.D.C.1979). Thus, they proposed that two requirements were essential to sustain a defense of state action immunity: "(1) adequate public supervision and (2) a clear state purpose to displace antitrust law." Areeda & Turner, *supra*, ¶ 212 at 71. The similarity between this proposal and the test eventually adopted in *Midcal* suggests that the Court perceived the reasonableness of dropping its earlier compulsion languages and adopting a simple and clear rule of general applicability.

Clearly, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351, 63 S.Ct. at 314. The Court in *Midcal* recognized this limitation on state action immunity, 445 U.S. at 106, 100 S.Ct. at 943-944, and thus formulated a test which examines the extent of the state's involvement at two levels—first, at the level of articulation of state policy in favor of the challenged restraint and second, at the level of implementation of that policy through active supervision. Significant involvement at both levels is necessary to support a state action exemption. And it is the combination of these two criteria that effectively guarantees that the state has considered the course of its conduct and has chosen to replace open market pricing with state regulation. Hence, the balance struck in *Midcal* between the federal policy of competition and state sovereignty is thus: the state may choose to displace competition with economic regulation by making clear its intention to do so; having made that choice, however, the state bears the burden of ensuring that this policy is furthered and that the state itself remains the ultimate decision maker.

The Court's recent decision of *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), amply illustrates the degree of directness and clarity necessary to satisfy the first prong of *Midcal*. In *Boulder*, the Court ruled that because the State's constitutional delegation of home rule authority to municipalities was not a "clear articulation and affirmative expression" of state policy in the area of cable television, a city's cable television moratorium was not afforded state action immunity. 102 S.Ct. at 843. In other words, when a home rule provision was added to Colorado's constitution, the state could not foresee that it was expressly authorizing a cable television moratorium. *Boulder* therefore can be fairly read to stand for the proposition that the state must be fully aware of what it is doing when it articulates and affirmatively expresses its policy to supplant open market competition. *Boulder* also is signifi-

cant because a majority of the Court appears to have ruled that "a municipality may invoke the *Parker* doctrine only to the same extent as can a private litigant." 102 S.Ct. at 850 (Rehnquist, J., dissenting); *accord* M. Handler, *supra*, at 64 ("*Boulder*, however, indicates that municipalities enjoy no more liberal a standard of immunity than private parties.").

The majority, however, would adhere to the position that the only way a state can articulate a clear and express policy (when a private defendant is sued) is by compelling all carriers to engage in collective ratemaking. Thus, the court maintains that if a motor carrier is permitted to join in the development and submission of joint rates through the bureaus, at its election, such a program cannot be a clearly and affirmatively expressed state policy. Initially, it seems clear that a state can articulate clearly a policy which incorporates both the benefits of joint ratemaking and separate filings. Indeed, such a policy of permissive joint ratemaking may be far superior to the complete mandatory joint ratemaking suggested by the majority. As the district court suggested, rate bureaus provide important support services to state regulatory bodies such as the staff experts and facilities necessary to collate data for the preparation of cost studies. *See United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 476 (N.D.Ga. 1979). *See generally* H.R.Rep. No. 1100, 80th Cong., 1st Sess. (1947). However, individual rate submissions also provide an important check on rate bureaus and preserve a certain degree of competition. For example, if an individual rate submission is significantly lower than a bureau rate proposal, the regulatory body is alerted to possible abuse of the privilege of collective ratemaking, and is better able to enforce and supervise its program than if there is no possibility of an individual rate proposal.

The irony of this litigation is that the Government seeks to enjoin states from implementing a transportation policy which parallels our national transportation policy. Federal law regulating interstate motor carriers adopts a policy of permissive joint ratemaking, and if a carrier chooses to participate in

government approved collective ratemaking it is expressly exempt from antitrust liability. 49 U.S.C.A. § 10706(b)(2) (West Supp. 1982), former 49 U.S.C.A. § 5(b) (1959). Drafters of the original federal exemption for collective interstate ratemaking, upon which North Carolina's law is modeled, stated the following with respect to the conflict between the antitrust laws and national transportation policy:

> It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder and the basic purposes of the Act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent . . . . It is obvious that confusion and uncertainty are inevitable where these two principles of public policy [antitrust laws and national transportation policy], administered and enforced by different agencies, are applied in such a way that there is conflict between them.

H.Rep. No. 1100, 80th Cong., 1st Sess. 4-5 (1947); S.Rep. No. 44, 80th Cong., 1st Sess. 3-4 (1947). Although there have been modifications of the statutory exemption for interstate carriers engaged in collective ratemaking, and there are those who would disagree with the current status of the federal regulatory framework, few would seriously argue that the federal government had not clearly articulated and affirmatively expressed a national transportation policy of permissive joint ratemaking.

Further evidence of a state articulation of state policy is the fact that all rates are closely supervised by the state.[5] This also

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[5] While we treat these as separate requirements, we nevertheless want to stress their interrelationship. The existence of state supervision over anticompetitive behavior *may*, for example, indicate the requisite state intent as well. Similarly, inaction on the part of the state may both represent a failure of supervision and reflect an ambiguous state purpose. 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 212 at 71 (1978).

illustrates the importance of satisfying both prongs of the *Midcal* test, for together they satisfy the function served by the *Goldfarb* formulation. The active supervision requirement is essential to the *Midcal* test because it inhibits the influence of economic self interest of the companies involved in the rate setting process. Such private self interest does not warrant the cloak of state action immunity. But, by requiring that a state actively supervise implementation of its economic policy, the *Midcal* test ensures that the state has determined that the challenged activity is in furtherance of the state's policy. When the state ceases to be the real party in interest, the sovereignty of the state cannot be said to be impaired by withholding state action immunity.[6] But when the state is the real party in interest, its continuous and active supervision evidences its intent to impose state regulation in lieu of open market competition, and withholding antitrust immunity does impair state sovereignty.

Because it is the requirement of active supervision which deters abuse of joint ratemaking procedures, if any distinction is to be drawn between public and private defendants, it should be in the amount of supervision deemed necessary to satisfy this portion of the *Midcal* test. It makes no sense to require compulsion for private and not public defendants when in both instances the same state policy will be thwarted by the threat

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[6] The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213 at 73 (1978) (footnotes omitted).

of antitrust liability. Looking to the degree of active supervision, on the other hand, may be more relevant in a suit against a private defendant because it is possible that abuse of the state system may be an issue.[7] Nevertheless, because the Government does not challenge the adequacy of any state's supervision in the present case, there is no reason to draw this distinction.

The only issue in this case, therefore, is whether the individual states involved clearly articulated and affirmatively expressed state policy in favor of permissive ratemaking. As set forth in my original dissent, I think it clear that the states of North Carolina, Tennessee and Georgia have such a policy. Nevertheless, because the district court entered a final judgment before the Supreme Court's pronouncements in *Midcal*, I would remand the case for further development of the factual record and for evaluation under the *Midcal* test.

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[7] Professor Areeda has even suggested that *Midcal's* active supervision requirement may be inapplicable to governmental defendants. Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 445 n. 50 (1981) ("A few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active supervision of *private* parties) to require state supervision of governmental defendants.") In *Community Communications Co.* v. *City of Boulder*, however, the Supreme Court expressly declined to decide whether the active supervision criterion must be met by a municipality with respect to the challenged ordinance. 102 S.Ct. 835, 841 n. 14 (1982).

THOMAS A. CLARK, Circuit Judge, with whom RONEY, Circuit Judge, joins dissenting:

I concur in Judge Hill's dissent and his thorough analysis of *Midcal* which demonstrates that compulsion is not a prerequisite for application of the state action exception.

Differing interpretations of Supreme Court opinions are not uncommon. What disturbs me so deeply about the majority opinion is that it completely ignores the Interstate Commerce Act, public policy, history, and fairness. As pointed out by Judge Hill, the functions of rate bureaus or conferences declared illegal by the majority have been accepted national policy for more than thiry years. These same defendants have performed the identical functions[1] for interstate carriers whose rates are fixed by the Interstate Commerce Commission. These functions, when performed by these bureaus for interstate carriers are exempted from the Antitrust Act by the Interstate Commerce Act:

> As provided by this subsection, a motor common carrier of property providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them . . . . If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.
>
> 49 U.S.C.A. § 10706(b)(2).

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[1] Described in the majority opinion, slip op. at 15988, at ____.

The states involved here likewise permit joint filings of rates by carriers through the medium of a bureau or conference, and permit individual carriers to file their own rates. Thus, not all carriers are compelled to file rates through a conference or bureau. The majority holds that if a state compelled uniform action by the carriers, such a state statute would meet the *Parker* v. *Brown* requirement of state action and joint action would be exempt from the antitrust statute. Again, I turn to the Interstate Commerce Act and find that the national act forbids exclusive rate-fixing in the following manner:

> (2) The Commission may not approve an agreement under this section—
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> * * * * * *
>
> (C) establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take independent action before or after a determination is made under that procedure.

49 U.S.C.A. § 10706(d)(2). Thus, as can be seen, the Commission does not compel carriers to participate in the agreement. The state statutes are patterned very much after the national act, permitting joint action through the bureaus and conferences, but also permitting individual action.

By way of hypothecation, Southern Motor Carriers Rate Conference, Inc. may file with the Interstate Commerce Commission rates for the carriage of carpeting from Rome, Georgia, to Nashville, Tennessee. That same Conference may perform the identical function for the intrastate carriage of carpeting from Rome to Macon, Georgia, approximately the same distance. This has been done for three decades prior to the filing of this action in 1976. It is patently unfair at this late date to declare that these defendants violated the antitrust act when following identical procedures that are not violative of the antitrust act when done in interstate commerce.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 79-3741

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.,
Defendants-Appellants.

Appeal From The United States District Court
For The Northern District Of Georgia

COURT OF APPEALS
ELEVENTH CIRCUIT

FILED
MAY 6, 1983

NORMAN E. ZOLLER
CLERK

ORDER:

( ) The motion of appellant, Southern Motor Carriers Rate Conference, Inc., *et al.*, for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of appellants, Southern Motor Carriers Rate Conference, Inc., *et al.*, for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 30, 1983,

the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Franklin Johnson, Jr.
FRANKLIN JOHNSON, JR.
UNITED STATES CIRCUIT JUDGE